A

REPORT

OF THE

ARGUMENTS AND JUDGMENT

UPON

The Demurrer,

IN THE CASE OF

HENRY EDMUND TAFFE, ESQ.

AGAINST

THE RIGHT HON. WM. DOWNES,

LORD CHIEF JUSTICE OF THE KING'S-BENCH,

IN

Ireland,

In Trinity, Michaelmas, and Hilary Terms, 1812 *&* 1813,

IN

THE COURT OF COMMON PLEAS,

Ireland,

BY JOHN HATCHELL, Esq.

Barrister at Law.

DUBLIN:

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1815.

ERRATA.

In page 38, in line 34, for "*Cantabrigi*" read "*Cantabrigiæ*."
39, in line 22, for "*Jomas*" read "*Jones.*"
63, in line 4, for "*lesson*" read "*lessen.*"
85, in line 24, for "*imputated*" read "*imputed.*"
92, in line 24, for "*Burchett*" read "*Burchell.*"
146, in line 25, in the punctuation dele the ";"
147, in line 15, for "*instancy*" read "*instance.*"
149, in line 12, in the punctuation dele the ";"
in line 36, in do. dele the ";"
150, in line 7, in do. dele the ";"
in line 19, in do. dele the ";"
152, in line 34, in do. dele the . between the words "independent" and "forward."
158, in line 22, in the punctuation dele the ";"
187, in line 23, for "*senechal*" read "*seneschal.*"
194, in line 12, for "*recitals*" read "*recital is.*"
206, in line 16, omit the words "by Judge Buller."
in line 18, omit the words "says he."
215, in line 6, for "*preamble*" read "*principle.*"
216, in line 4, for "*statue*" read "*statute.*"

A REPORT, &c.

COURT OF COMMON PLEAS.

The *Right Hon. John Lord Norbury, Lord Chief Justice.*

Luke Fox, Esq.
Edward Mayne, Esq. } *Justices.*
William Fletcher, Esq.

HENRY EDMUND TAAFFE, Esq.

against

THE RIGHT HON. *WILLIAM DOWNES*, Esq.
LORD CHIEF JUSTICE OF THE COURT
OF KING'S BENCH, IN IRELAND.

County of the City of Dublin (to wit.) } THE RIGHT HON. *WILLIAM DOWNES*, Esq. Lord Chief Justice of his Majesty's Court of *King's-Bench*, in *Ireland*, was attached, to answer *Henry Edmund Taaffe*, Esq. of a plea of trespass with force and arms, and thereupon the said *Henry Edmund*, by *Edward O'Callaghan*, his Attorney, complains, FOR

Michaelmas Term 52d *Geo.* 3d.

Declaration

1st Count. THAT the said *William*, on the 9th day of *August*, in the Year of our Lord, 1811, with Force and Arms, made an Assault upon the said *Henry Edmund*, to wit at *Castle-street* in the County of the City of *Dublin* and then and there imprisoned the said *Henry Edmund* and kept and detained him in Prison there, without any reasonable or probable cause, for a long space of time, to wit, for the space of four hours, then next following, contrary to the Laws of this Realm, and against the Will of the said *Henry Edmund*.

2d Count. The second Count was similar to the first; except in omitting the words "without any reasonable or probable cause."

3d Count. The third Count was for a common Assault.

The Damages were laid at £5,000.

To this Declaration the Defendant pleaded,

1st Plea. First, the General Issue.

2d Plea. "not guilty" as to part: as to the residue justification. The second Plea; "Not Guilty" as to part of the trespasses laid in the three several Counts of the Declaration, and as to the residue, viz: "The assaulting the said *Henry Edmund*, and the imprisoning him and keeping and detaining him in Prison for the space of time," and so forth, proceeded to justify as follows: AND THAT before the said time, when and so forth, to wit, on the 24th day of *September*, in the 43d Year of the reign of the said Lord the now King, at *Castle-street*, in the County of the City aforesaid, the said Lord the King, by his Certain Letters Patent, under the Great Seal of that part of the United Kingdom of *Great Britain* and *Ireland*, called *Ireland*, bearing date the same Day and Year last aforesaid, made at *Dublin* in the County of the City aforesaid, did constitute and appoint the said *William Downes*, to be Chief Justice of the said Lord the King, in that part of the said United Kingdom called *Ireland*, with all and singular, the Authorities, Rights, Privileges and Advantages whatsoever to the same Office, in any manner belonging. TO have and TO hold, enjoy, and exercise the said Office, with all others the Premises in the said Letters Patent aforesaid, to the said *William Downes*, during his good behaviour,

Provided Always that the said Letters Patent, should be enrolled in the *Rolls* of the High Court of *Chancery* of the said Lord the King, in that part of the said United Kingdom called *Ireland*, within the space of Six Months next ensuing the date of the said Letters Patent; as by the said Letters Patent, under the Great Seal of that part of the said United Kingdom called *Ireland*, and which the said *William Downes*, now shows to the Court here, sealed with the Seal aforesaid, the Date whereof is the same day and year last aforesaid, will more fully and at large appear. AND the said *William Downes* further saith, that the said Letters Patent were afterwards, to wit, the Day and Year last mentioned, and at the same place duly accepted by him, and were afterwards duly enrolled in the *Rolls* of the said High Court of *Chancery*, of the said Lord the King, within the space of Six Months next, after the date of the said Letters Patent, to wit, on the 28th Day of *September*, in the 43d Year of the Reign aforesaid, at *Dublin* aforesaid, and in the County of the City aforesaid; and that by Virtue of the said Letters Patent, and the said Enrollment and Acceptance thereof, he, the said *William Downes*, then and there became, and was and since continually, hitherto hath been, and at the said time, when and so forth was, and yet is, Chief Justice of the said Court of *King's Bench* of the said Lord the King. AND the said *William Downes* further saith, that before the said time when and so forth, to wit on the 8th day of *August*, in the said Year of our Lord, 1811, at *Castle-street*, in the County of the City aforesaid; he, the said *William Downes*, as, and then and there, being such Chief Justice aforesaid, did, as such Chief Justice, make his certain Warrant in Writing, under his Hand and Seal, directed to one *Francis Hamilton*, who then and there was a Constable of the County of the City aforesaid, duly constituted and appointed, and to all or any of the Constables of the County of the City of Dublin, and their Assistants; by which said Warrant, reciting that it appeared to the said *William Downes* by Information upon Oath, that on the 9th Day of *July* then last, a number of Persons assembled at *Fishamble-street*, in the County of the City of *Dublin*, did propose, and resolve, that a Committee of persons professing the Roman Catholic Religion, should be appointed to represent the Roman Catholics of *Ireland*, for the Purpose,

or under the Pretence of preparing Petitions, to both Houses of Parliament, for the Repeal of all Laws in Force in *Ireland*, particularly affecting the Roman Catholics of *Ireland*; and that he, the said *William Downes*, had also received Information on Oath, that on the 31st day of the same month, divers other Persons assembled in the Roman Catholic Chapel in Liffey-street, in the County of the City of *Dublin*, for the purpose of appointing five Persons to act in such Committee as aforesaid, as the Representatives therein of the Parish in which the said Chapel was then situate; and that at the said Meeting at *Liffey-street*, one *Edward Sheridan* was appointed one of the said Representatives, and that *Thomas Kirwan*, *Gregory Scurlog*, *Henry Edmund Taaffe*, (meaning the said *Henry Edmund Taaffe*, the now Plaintiff,) and Doctor *John Breen*, were four of the Persons so there assembled, and that they, and each of them, then and there acted in such Appointment of the said *Edward Sheridan*, to be such Representative as aforesaid, against the form of the Statute in that case made and provided; he the said *William Downes*, did in his Majesty's name strictly charge and command the said *Francis Hamilton*, and the Constables aforesaid, all, or any of them, and their Assistants, to apprehend the said *Thomas Kirwan*, *Gregory Scurlog*, *Henry Edmund Taaffe*, and Doctor *John Breen*, and to bring their Bodies before the said *William Downes*, or some other of the Justices of his Majesty's said Court of *King's Bench*, that they might be dealt with according to Law; which said Warrant, he the said *William Downes*, as, and then and there being such Chief Justice as aforesaid, afterwards, and before the said time, when and soforth, to wit, on the said 9th Day of *August*, 1811, at the City of Dublin, aforesaid, and County of the said City, did issue, and cause to be delivered to the said *Francis Hamilton*, so then and there being such Constable as aforesaid, to be executed in due form of law; by virtue of, and in obedience to which said Warrant, the said *Francis Hamilton*, as such Constable, as aforesaid, afterwards, and at the said time, when and soforth, did arrest and apprehend the said *Henry Edmund Taaffe*, by his body, to wit, at *Castle-street* in the County of the City aforesaid, and having so apprehended the said *Henry Edmund*, did with all convenient speed bring the said *Henry Edmund* in his Custody, before the said *William Downes*, as, and then, and

there being such Chief Justice as aforesaid, according to the exigency of the said Warrant; and thereupon, and on Consideration of the Premises, the said *William Downes* as, and then, and there being such Chief Justice as aforesaid, did, then, and there, to wit, on the said 9th day of *August*, in the said Year, 1811, deliver him, the said *Henry Edmund* to bail, for his personal appearance in his Majesty's said Court of *King's Bench*, on the first Sitting Day of the then next *Michaelmas* Term, and that he should there attend from Day to Day, and Term to Term, and answer all such Matters and Things as should be then and there objected against him on the part of his Majesty; and thereupon, he the said *Henry Edmund*, was discharged out of the Custody of the said *Francis Hamilton*, to wit, at the City of *Dublin*, and County of the City aforesaid. And the said *William Downes* saith, that the said *Henry Edmund* on the occasion aforesaid, was kept and detained in custody, for the space of time in the said Declaration mentioned, which is the same Residue of the Trespass in the Introductory Part of this Plea mentioned and supposed, and whereof the said *Henry Edmund* hath complained; and this he is ready to verify, wherefore he prays Judgment if the said *Henry Edmund* ought to have, or maintain his Action thereof aforesaid against him.

(*a*) The third Plea was similar to the second, so far as Pleading "Not Guilty," as to part of the several Trespasses, "Except" and soforth: as to which Residue, it justified as in the Second Plea, reciting the Grant of the Letters Patent, their Acceptance and Enrollment &c. and then proceeding as follows: AND THE said *William Downes* further saith, that before the said time, when and soforth, to wit, on the 6th Day of *August*, in the Year of our Lord 1811, at the City of *Dublin* aforesaid, and County of the said City, one *Francis Huddlestone* came in

3d Plea, "not guilty" as to part.

as to the residue Justification.

(*a*) The Argument was confined to the Demurrer upon the second Plea. The third is here set out, on account of it having been referred to in the Argument, and as containing the only printed copy of the informations, upon which the arrest, and trials of Dr. *Sheridan* and Mr. *Kirwan* were founded.

his proper person before the said *William Downes*, as, and then, and there being as aforesaid Chief Justice of the said Court, of the said Lord the King of the King's Bench, and then, and there upon his Oath upon the Holy Gospels of God, then, and there by the said *William Downes*, so being such Chief Justice as aforesaid, and then, and there having full power, and lawful authority, as such Chief Justice as aforesaid, to administer an Oath in that behalf, in due form of Law administered to the said *Francis Huddlestone*, the said *Francis Huddlestone* did depose, swear, and make information before the said *William Downes*, then and there being such Chief Justice as aforesaid, that on *Tuesday* the 9th day of *July* then last, he the said *Francis Huddlestone* attended an Aggregate meeting of the Roman Catholics of *Ireland*, held in the Old Theatre in *Fishamble-street*, when Mr. *Hay*, the Secretary, at said meeting, read certain Resolutions of the General Catholic Committee of a former meeting, of the purport following viz: That on the 9th day of *July*, an Aggregate meeting of the Catholics of *Ireland* should be convened to receive the report of the Committee, and to take into Consideration the propriety of presenting Petitions to Parliament at an early Day in the ensuing Session; and that at said Aggregate Meeting, the Earl of *Fingall* was in the Chair; and that *Purcell O'Gorman* Esq. (who was one of said Assembly, and who was also one of said former Committee) proceeded and reported the proceedings of said former Committee, and that the said *Purcell O'Gorman* proceeded and spoke at considerable length on the subject of Catholic grievances, and the Penal Laws affecting them, and then moved several Resolutions which were unanimously carried; amongst others; That a Petition should be again prepared to the Legislature, for a Repeal of the Laws affecting the Catholics of Ireland; after which a Mr. *John Byrne* then moved certain Resolutions, amongst which were the following, which were carried unanimously, viz: That the Committee to be appointed to prepare Petitions to Parliament do consist of the Catholic Peers and their eldest Sons, the Catholic Baronets, the Prelates of the Catholic Church in *Ireland*, and also ten persons to be appointed by the Catholics in each County

in *Ireland*, the Survivors of the Delegates of 1793, to form an integral part of that number, and also of five persons to be appointed by the Catholic Inhabitants of each Parish in the City of Dublin. And the said *William Downes* further saith, that afterwards, to wit, on the 6th day of *August*, in the said year 1811, at the City of *Dublin* aforesaid, and in the County of the said City, and before the said time, when and soforth, one *James M'Donough* came in his proper Person before the said *William Downes*, as and then and there being such Chief Justice as aforesaid, and then and there upon his Oath upon the Holy Gospel of God, then and there to the said *James M'Donough* in due form of law administered by the said *William Downes*, so being such Chief Justice as aforesaid, and then and there having full power and lawful authority as such Chief Justice as aforesaid, to administer an Oath to the said *James M'Donough* in that behalf, did depose, swear, and make information before the said *William Downes*, then and there being such Chief Justice as aforesaid, that on Wednesday, the 31st day of July, then last, between the hours of 12 and 1 o'Clock, the said Informant, the said *James M'Donough*, (in consequence of orders he received) attended at the Roman Catholic Chapel in *Liffey-street*; and that he there saw a considerable number of persons assembled, amongst whom was one called Doctor *Sheridan*, who was in the Chair; and that one of the persons of said assembly, whose name the said last-mentioned Informant heard, and believed was *Thomas Kirwan*, moved that a Petition be presented to his Royal Highness the *Prince Regent*, and both Houses of Parliament, praying for the removal of the Penal Laws which still existed against the Roman Catholics of *Ireland*; which Resolution was seconded and carried unanimously; and that the said *Thomas Kirwan*, then and there moved, that a Committee of five should be appointed to present the said Petition, and that said Committee of five were also to represent the Catholics of said Parish in the General Committee of the Catholics; and that the said *Thomas Kirwan* then proposed, that seven persons of those who were then present at said Meeting, should be nominated to appoint the said Committee of five delegates; but that none of the said seven persons were to be eligible to be of the said Committee of the five

delegates; and that the said seven persons were then nominated: by the Chairman Doctor *Sheridan* first naming one, and the person so named mentioned a second, and the second named a third, and so on until the seven delegates were nominated; and that of the seven persons so nominated, he the said Informant, the said *James M'Donough*, heard the names of five of them, that is to say, Mr. *Scurlog*, Mr. *Cole*, Mr. *Fitzpatrick*, Mr. *Fegan*, and Mr. *Breen*, whom he the said last mentioned Informant knew to be a Dr. *Breen*, and that he would know said Dr. *Breen* and Mr. *Scurlog*, but did not think he would know any of the rest of said seven Persons; and that as soon as said seven Persons were nominated, they retired for a short time, when they returned again, and proceeded to mention the Persons, they had so appointed, by beginning first with Dr. *Sheridan's* name; when it was immediately moved and carried, that Dr. *Sheridan* should leave the Chair, and that one Dr. *Burke* should take it; which being done, Dr. *Sheridan's* name was put by the Chairman Dr. *Burke*, to a vote of the whole Meeting, and unanimously agreed to, after which the said Dr. *Burke* left the Chair, and the same was resumed by the said Dr. *Sheridan*; and that the others of the said Committee were *Thomas Kirwan*, *Henry Edmund Taaffe*, *William Sweetman*, Jun. and *Richard Sheil*, whose names were separately put to the like vote by Dr. *Sheridan*, all of whom were unanimously agreed to with the exception of one Vote against *Richard Sheil*, whose attendance was considered as likely to be uncertain; but which objection was over-ruled, and he was then agreed to; and that *Thomas Kirwan* (one of the said Committee of five) when he found that he was appointed, expressed his approbation and thanks at being appointed; and said, that he would discharge the Duty of the Trust reposed in him to the utmost of his power, or words to that effect; and that on said Committee being appointed, it was moved, that Dr. *Sheridan* should leave the Chair, and that Mr. *Henry Edmund Taaffe* should take it; which being done, the thanks of the Meeting were unanimously voted to Dr. *Sheridan* for his proper conduct in the Chair, after which the said Meeting broke up; and that of the said Committee of five, he the said last mentioned Informant saw three persons present, that is to say,

Dr. *Sheridan*, Mr. *Kirwan*, and Mr. *Tuaffe*, all of whom he the last mentioned Informant would know again, and that he believed the other two, *William Sweetman* Junior, and *Richard Sheil* were not then present; and that early in the business of said meeting, some person of the assembly was proceeding to move some matter, when another person of said assembly interrupted him, and begged said motion might be withdrawn, as it would only retard the business of the Meeting; and then asked, as well as he the said last mentioned Informant could understand, if they knew that a Proclamation had been issued; and that said Motion was thereupon given up, and the proceedings by the said last mentioned Informant before mentioned, took place.

And the said *William Downes* further saith, that afterwards, and before the said time, when and soforth, to wit, on the 8th day of *August*, in the said year 1811, to wit, at the City of Dublin, and County of the City aforesaid, one *John Shepherd* came in his proper person before the said *William Downes*, as and then and there being as aforesaid Chief Justice of the said Court of the said Lord the King, of *King's Bench*; and then and there upon his Oath upon the Holy Gospels of God, then and there to the said *John Shepherd* in due form of Law administered by the said *William Downes*, so being such Chief Justice as aforesaid, and then and there, having full power and lawful authority as such Chief Justice as aforesaid, to administer an Oath to the said *John Shepherd* in that behalf, did depose, swear, and make Information before the said *William Downes*, then and there being such Chief Justice as aforesaid: that on Wednesday the 31st day of *July* then last, he the said *John Shepherd* attended at the Roman Catholic Chapel in *Liffey-street*, in consequence of having heard that a Meeting of Roman Catholics was to be held there, for the purpose of electing five persons to represent the Roman Catholics of *Saint Mary's* Parish in the general Catholic Committee; and that between the hours of 12 and 1 o'Clock, on the said day, a considerable number of persons were assembled in said Chapel, and that he saw there a person called Dr. *Sheridan* in the Chair; and that one of the said persons, whose name the said last mentioned Informant heard and believed was

Thomas Kirwan, addressed the Chair, and moved that a Petition be presented to his Royal Highness the *Prince Regent*, praying for the removal of the Penal Laws still in existence against the Catholics of *Ireland*, or words to that effect; which resolution was seconded and carried unanimously; and that the next proceeding at said Meeting, was a Motion made by the said *Thomas Kirwan* to appoint a Committee of five, to present said Petition, and to represent the Catholics of said Parish in the General Committee of the Catholics; which said General Committee of the Catholics, the said last mentioned Informant understood, and had no doubt, was the Committee of Roman Catholics, which, at a Meeting held on Tuesday the 9th day of *July* then last, purporting to be an Aggregate Meeting of the Roman Catholics of Ireland, it was resolved should be appointed to prepare Petitions to Parliament; and that the same should consist of the Catholic Peers, and their eldest sons, the Catholic Baronets, Prelates of the Catholic Church in Ireland, and also the ten persons to be appointed by the Catholics in each County in Ireland, the survivors of the Delegates of 1793 to form an integral part of that number, and also of five persons to be appointed by the Catholic Inhabitants of each Parish of the City of Dublin; and that the said last mentioned Motion, of the said *Thomas Kirwan*, was carried unanimously; whereupon the said *Thomas Kirwan* proposed, that seven of the persons who were then present, (and who were not Candidates for the said Committee,) should be nominated to appoint the said Committee of five, which Committee was to be selected from a list, which the said last mentioned Informant heard one of the persons present say would be given to the said seven persons; and that the said seven persons were appointed, by the Chairman Dr. *Edward Sheridan*, having first named one, and that person named a second, and the second named a third, and so on until the seven were nominated; and that he the said last mentioned Informant could not distinctly hear the names of all the said seven persons, so nominated, but that he heard the names of some of them, viz: Mr. *Scurlog*, Mr. *Cole*, Mr. *Fitzpatrick*, Mr. *Fegan*, and Mr. *John Breen*; and that said seven persons as soon as they were nominated, retired for a short time, which might be from five to ten minutes, when they returned

again, and mentioned five persons, viz: Dr. *Sheridan*, on whose name being mentioned, it was moved and carried, that he, Dr. *Sheridan* should leave the Chair, and one Dr. *John Joseph Burke* take it; which was accordingly done; and that the others of the said Committee were *Thomas Kirwan*, *Henry Edmund Taaffe*, *William Sweetman* Junior, and *Richard Sheil*; and that the name of Dr. *Sheridan* was put by Dr. *Burke* the Chairman, to a vote of the whole meeting, and unanimously agreed to; after which the said Dr. *Burke* left the chair, and the said Dr. *Sheridan* resumed it; and that the remaining four of said Committee were separately put to the like vote, by Dr. *Sheridan*, all of whom were unanimously agreed to, with the exception of one vote against *Richard Sheil*, whose attendance was considered as likely to be uncertain; which objection, being over ruled, he was then agreed to. And that *Thomas Kirwan* one of the said Committee of five, when he found that he was appointed, expressed his approbation and thanks at being appointed, and said, he would discharge the duty of the trust reposed in him, to the utmost of his power, or words to that effect. And that on said Committee being appointed, it was moved, that Dr. *Sheridan* should leave the Chair, and that Mr. *Henry Edmund Taaffe* should take it; which being done, the thanks of the Meeting were unanimously voted to Dr. *Sheridan* for his proper conduct in the Chair; after which the said Meeting broke up; and that of the said Committee of five, three only were present, as the said last mentioned Informant believed, that is to say: Dr. *Sheridan*, *Thomas Kirwan*, and *Henry Edmund Taaffe*, which said three persons said last mentioned Informant would know again; and that of the seven persons who were so nominated as before mentioned, he would know one, whose name he heard and believed to be Mr. *Gregory Scurlog*; and that he believed he would know some others of the said, persons if he was to see them again. And that early in the business of said Meeting, some person, whom the said last mentioned Informant could not see, was proceeding to make some Motion, when he was interrupted by another person of said Assembly, (whom the said last mentioned Informant did not know) who begged of him to withdraw his Motion, as it would only retard the

business of the Meeting; and then asked, if they knew that a Proclamation had been issued, and that thereupon the said Motion was given up, and the Proceedings by the said last mentioned Informant before mentioned, took place.

And the said *William Downes* further saith, that afterwards, and before the said time, when, and soforth, to wit, on the said 8th day of *August* in the said year 1811, at Castle-street in the County of the City aforesaid, he the said *William Downes* so then, and there being, and as such Chief Justice as aforesaid, did upon the said several Informations aforesaid of the said *Francis Huddlestone*, *James M'Donough*, and *John Shepherd*, make his certain other Warrant in writing, under his hand and seal, directed to one *Francis Hamilton*, who then, and there was." &c.—And so proceeded to state the issuing of the Warrant—the Arrest of the Plaintiff, and delivering him to bail, as in the second Plea; and concluded with an averment, of the Plaintiff being the person named in the Warrant, and described in the Informations, &c.

Replication and Demurrer. The Plaintiff joined issue on the first Plea, and on the several issues taken by the second and third pleas; took a *General Demurrer* to the justification in the second; and, (admitting the Defendant's appointment &c.) replied *de injuriâ suâ propriâ* to the third.

Rejoinder. The Defendant joined, in Demurrer, upon the second Plea, and issue upon the third.—

Trinity Term. On Friday, the 12th of June 1812, the Demurrer came on to be argued before the full Court.

For the Plaintiff. MR. PERRIN (having stated the Pleadings, at length,) proceeded. My Lords, the first question for your examination on these Pleadings, is, has the Chief Justice of the Court of King's Bench authority to apprehend and imprison any man, upon his Warrant, of his own mere motion, without any information on which to found that Warrant; for if he can justify an Arrest, without setting out that information, he has that authority. The position, that he

has, seems monstrous; yet such is the position maintained in this Plea; which merely states, that the Right Honorable and learned Defendant is Chief Justice; that as such he issued a certain Warrant, containing certain recitals of information, on which Warrant the Plaintiff was imprisoned. But that those recitals were true, it does not allege. The only averments in the Plea are; that the Defendant was Chief Justice; that he issued a Warrant of a certain description, and that the Plaintiff was imprisoned under that Warrant. These are the only matters to be proved in support of that Plea, that the Warrant contains the recital, not that the recital is true. On proof of these bare facts, the Defendants Case, as set forth in this Plea, is established; and if that Plea be good and sufficient, these facts, strange as the expression must seem, amount to a justification of the Defendant's conduct. The recital in this Warrant forms no part of the Plea; its truth is not insinuated—the Plea may be true, and the recital utterly false. It may be true, that the Right Honorable and learned Defendant issued a Warrant, reciting that he had certain information; and yet it may be false, that he had any such information. The presumption on this Plea is, that he had none; for he has not ventured to assert that he had any. It is no answer to say, that he shall be presumed to have acted legally, and properly; that his recital shall be presumed to contain the truth. We are not here upon presumptions. The liberties of the people are not to be invaded, or violated with impunity upon presumptions. He is here called upon to say, why he imprisoned Mr. *Taaffe*; and to that he must answer directly and positively. The declaration charges that he imprisoned the Plaintiff, without any reasonable or probable cause, contrary to the Laws of the Realm: and to that charge, the Plea must answer directly;—to that charge, this Plea does not answer directly, or at all—The recital is mere words—The charge is, that he acted contrary to the Laws of this Realm, without any reasonable or probable cause. The Plea does not alledge that he had any reasonable, or probable cause; it does not allege that he had any information; it must therefore on principles of common sense, as well as of Law, be taken, that he had no information—" a Plea ought to be direct " and positive, and shall be taken most strongly against

" the Defendant." If this recital sustains the Plea, what becomes of this rule? What becomes of personal liberty? The Magistrate may recite what he pleases in his Warrant, and the Plaintiff cannot traverse the recital, for its truth is not averred.

Then the question on this pleading is, as I have stated it; has the Chief Justice of the Court of King's Bench authority, to apprehend and imprison any man, of his own mere motion, and without information? Can he do so with impunity? Is he not responsible for abuse of that authority? To state such a question, is to answer it. Is it not clear as day light, upon general principles, that he has no such authority? It were enough to read the charge—to recollect the right which has been invaded and violated, to overthrow this Plea. I might rely and rest my argument altogether, upon the nature of the injury complained of, of the right which has been violated, a right strictly natural; upon " the jealousy and anxiety, " with which the Law of *England* regards, preserves, " and asserts that right," " the personal liberty of indi- " viduals," which in the emphatic words of *Mr. Justice Blackstone*, " the Laws of *England* have never abridged " without sufficient cause, and which, in this Kingdom, " cannot ever be abridged, at the mere discretion of the " Magistrate, without the *explicit* permission of the Laws."

Here, my Lords, I might rest my Client's Case, and ask, where is the explicit permission of the Law, to sanction this violation of Mr. *Taaffe's* personal liberty? Is it law, that no freeman shall be taken or imprisoned, but by the lawful Judgment of his equals, or by the Law of the Land? Is the great Charter repealed? If this Plea be sustained, it is not Law, that personal liberty cannot be abridged at the mere discretion of the Magistrate. It is empty sound. The enactments of the Great Charter, are empty sound. This Plea asserts nothing, but that the Chief Justice did imprison Mr. *Taaffe* upon his mere discretion or motion, without any cause, without any permission of the Law. What explicit permission of the Law, does this Plea aver? That he was Chief Justice, that as such he issued his mandate, and imprisoned the Plaintiff. If this Plea be sufficient to excuse this act, and to bar the Plaintiff, the great

Charter is repealed. It is false, that no Freeman may be taken or imprisoned, but by the lawful judgment of his equals, or by the Law of the Land. Any man may be taken and imprisoned on the mandate of the Chief Justice, at his discretion, or his caprice; and there is an end to freedom, if any man in the state has such an authority. But, my Lords, I rely that no man has. I rely upon those passages I have cited; upon the positive enactments of *Magna Charta*, with which such an authority in any person is utterly repugnant, and inconsistent. However strong as those general principles are: decisive as the repugnancy and utter inconsistency of this Plea with their existence, are against its validity, my Client's case does not rest even on them. The Law has ascertained and defined with precision, the authority of the Magistrate to arrest; the cases and instances in which he may exercise that authority, and make an arrest.

Further, the Law prescribes as precisely, the mode in which he shall justify such Arrest. Aware of the danger of abuse, of the liability of those invested with so high a power, to exceed the limits of Legal authority, it has not only defined the authority itself, but prescribed precise rules, according to which the exercise of that authority shall be justified. "The "Magistrate may Arrest upon strong suspicion of certain "offences, even before indictment found. He may justi- "fy an Arrest, even of an innocent person, on strong sus- "picion; but if he has matter of Justification or excuse, "he must plead it." He must not act without reason and ground to act, and he must satisfy the Court, that he had sufficient reason. They, not he, are to judge of that —this is settled and decided Law, as your Lordships will find from the following authorities:—In *2nd Hawkins* 135, [and *Hawkins* was a person, by no means inclined to curtail the authority of the Magistrates,] it is said, "it seems "that a Justice may justify the granting a Warrant for "the Arrest of any person, upon strong grounds of suspi- "cion, for felony or other misdemeanor, before indictment "found," He may justify upon strong suspicion. How is he to justify: by setting out the matter of his justification, the ground of his strong suspicion, in his Plea. "But if a "man has matter of justification or excuse, he ought to "plead it specially," 5 *Comyns Dig.* 401. *Pleader E.* 15,

Co. Litt. 282. Here is the rule precisely defined; and though under the statute, the Defendant may plead the general issue, and give the special matter in evidence; yet not having chosen to rely on the general issue only, his special Plea must be tried by the common rules of Pleading, and comply with their requisitions. So again 2 *Hawkins* 121, "it seems to be certain, that whoever would justify the "Arrest of an innocent person, by reason of any suspicion, "must not only shew, that he suspected the party himself; "but must also set forth the cause, which induced him to "have such suspicion, that it may appear to the Court, "to have been a sufficient ground for his proceeding."—

Here, my Lords, is the universal rule, and the powerful reason of that rule—"Whoever would justify," no exception—no restriction—But whoever he be, on "the arrest of an innocent person," (and there is no insinuation that Mr. *Taaffe* is not an innocent person,) "he "must set forth, not only his suspicion, but the cause or "foundation of his suspicion"—And why? "That the "Court may judge, whether he had sufficient ground for "his proceeding," a matter not confided to his mere discretion, but to the judgment and revision of the Court.—Again in *2nd Institute* 52, "if treason or felony be done, "and one hath just cause of suspicion, this is good cause "and warrant in the Law, for him to arrest any man; "but he must shew in certain the cause of his suspicion; "and whether the suspicion be just or Lawful, shall be "determined by the Justices in an action of false imprisonment brought by the party grieved."—So my *Lo'd Coke* says—What is there here, to assert or maintain the power, arrogated by this Plea—he must shew in certain the cause of his suspicion, that it may satisfy, not his discretion, but the Justices; that they may determine, whether it be just and Lawful, in this very form of action, an action of false imprisonment. So in 17, *Edward IV, page 5*, in trespass and imprisonment *Coke* and *Littleton* held the plea bad, as not setting out the cause or suspicion; otherwise they say, one could Arrest any man on any offence committed; and *Hale* in his History of the *Pleas of the Crown*, 2 *vol. p.* 78, says, "he [the Constable] must "allege his justification in the same manner, as he that "suspected ought, viz. a Felony done, and cause of suspicion." And in like manner, he says of a Justice of the

peace. And he goes on to sustain the power of the Justice, by saying, that " if they find the causes of sus-
" picion to be reasonable, it is now become the Justice's
" suspicion, as well as the party's."—So tender was the Law, of the liberty of the subject, that the justification of the Arrest of an innocent person, ought antiently to have averred, that a crime had been committed.—But that being two severe on Magistrates and officers, obliged to act on the informations of others, the rule has been wisely relaxed; and they, who are bound to act on such information, may justify upon it. They are not bound to vouch the truth of the information; but the fact of information, if sufficient to raise a just and lawful suspicion, protects and excuses them. I have not adverted to any of the authorities of justification, on the score, that the Plaintiff had been guilty of an offence: for in this Plea, there is no allegation or insinuation, that Mr. *Taaffe* committed this offence; if the act, described in the recital, even does amount to an offence.

Before I close this topic, I will mention one or two cases more; not, that I think the authorities I have cited, or the principles contained in them, stand in need of confirmation, or can be fortified; but for their peculiar appositeness, to the case before your Lordships. *Windham* v. *Clere*, *Croke Eli.* 130. also reported in 1st. *Leonard* 187, was an Action on the case. According to the old form, the Plaintiff declared: that the Defendant was a Justice of Peace, and that intending to injure and aggrieve him, he directed his Warrant to divers Constables, alledging, that the Plaintiff was accused of stealing a horse: whereby he, the Plaintiff, was arrested; whereas in truth, he did not steal the horse, nor was he accused thereof—Plea, not guilty; verdict for the Plaintiff; and it was held by *Clench* and *Gawdy* " the Action was
" maintainable. If a man be accused to a Justice of the
" Peace, for an offence, for which he causes him to be
" Arrested by his Warrant, although the accusation be
" false, yet he is excusable—but if the party be never
" accused, but the Justice of his malice, or of his own
" head, cause him to be arrested, it is otherwise; and
" they commanded judgment to be given for the Plain-
" tiff."—In that case the Warrant recited an accusation,

as in this case, and it was so stated in the declaration. If that recital were a sufficient justification of the Justice, the Plaintiff on his own shewing, had no cause of action: and that is at least as strong, as if it had appeared on the Defendants plea; but the Court held, that the Plaintiff had a cause of Action: and therefore, that the recital of a charge in the Warrant, was not a justification—that it was not evidence, that such a charge had been made. In *Hill* v. *Bateman*, 1 *Strange* 711, it is decided expressly, that " in Actions of Trespass against Justices, they must " shew the regularity of their Proceedings." On these Authorities; on the principles contained in them—principles that cannot be impeached or denied—I rely, that this plea is bad as a justification, in as much as it does not set forth, or aver, any information or cause of suspicion—The principle is general—is universal—It acknowledges no distinction, no restriction—'tis extensive, as the right it protects—as the universal privilege of personal liberty—it is asserted, not as a restraint, on the authority of the Magistrate; but as the right of the individual—that strictly natural right, which cannot be abridged at the discretion of any Magistrate—the lowest, or the highest; the Justice of the Peace, or the Chief Justice.

But this plea seems to insist on a sort of inviolability of the Chief Justice. It says, that the Defendant was Chief Justice, with all and singular the authorities, rights, privileges, and advantages whatsoever, to the same Office in any manner belonging—that he did this act as Chief Justice; and that therefore the Plaintiff ought not to have or maintain this Action—This may mean one of two things—either, that as Chief Justice he had an authority, which no other person possesses; or that he has the privilege, of not answering the Plaintiff in this Action, for his misconduct: admitting the act to be illegal. The latter position seems, on the face of it, a palpable absurdity. That an act should be illegal, and not punishable;—that any one should injure another against the Law, and yet with impunity, seems not very consonant, either with law or sense. It is certainly a very alarming privilege; and in any case, peculiarly deserving of attention. In this case it is most extraordinary, that it should be relied upon. This Action was instituted, to try an important public question; but one,

whose consequence vanishes into insignificance, before that now started by this plea.—Is it the privilege of the Chief Justice, or of any Judge, to imprison any of his fellow subjects, and not to answer for his abuse of that privilege? My Lords, I feel the whole weight of this important question. I am deeply sensible, no one can be more so, of the great interest and concern, the public has in the independence of the Judges—that in all Judicial acts, their thoughts should be disturbed or distracted neither by fear or favour, apprehension or affection. But my Lords, it must not be forgot, that the public benefit is the object, and foundation of this Authority, and should govern its extent.—It must not be forgotten, that beneath the robe of Justice, they bear the infirmities of men; and that the very principle, which clothes them in privilege, disarms them of power to be exerted, not for public good, but individual oppression.—And I trust, that in establishing the Case of my Client, and his right to retribution from the Right Honourable and learned Defendant, for the injury sustained under his act, I shall endanger no legitimate privilege of the Bench; or in any degree impair, the dignity of the high Ministers of Justice.

I admit the general proposition, that no Judge is answerable for any judicial act—but I contend, that it is equally clear, that the protection extends not beyond judicial acts. It is to be observed, that this protection or privilege, is not the result of any enactment or positive Law; but a principle recognized and established, by a series of Authorities from which it flows; and by which its extent must be Determined—Therefore, what are judicial Acts; what the Acts are, which this maxim includes, and judicial privilege protects, I shall endeavour to ascertain: not by any speculative considerations of policy, but by settled and decided Cases, and Authorities, and the principles by them established. In *2nd Bacon's Abridgment* 97, I find, (he is speaking of the Authority of Judges, and the Judicial Character,) "but though they [Judges] are to Judge, "according to the settled, and established Rules, and "Antient Customs of the Realm, approved for many "successions of Ages; yet they are freed from all pro-"secutions, for any thing done by them in Court, which "appears to have been an error of their Judgment,"—

Here is the maxim, and its extent, as laid down by the learned compiler.—" Any thing done in Court, on Error of Judgment." In *Cowper* 122, *Mostyn* v. *Fabrigas*, Lord *Mansfield* says, " By the Law of *England*, if an " Action be brought against a Judge of Records, for an " act done by him, in his Judicial Capacity; he may " Plead, that he did it as a Judge of Record, and that " will be a complete Justification "—And proceeding, he explains, and defines the meaning of these general expressions. So in this case, if the injury complained of, had been done by the Defendant, as a Judge: though it arose in a foreign Country, where the technical distinction of a Court of Record, does not exist; yet sitting, as a Judge, in a Court of Justice, subject to a superior review, he would be within the reason of the rule, which the Law of *England* says, shall be a justification.—

Here, my Lords, pointing out the acts, which a Judge may completely justify by the Plea, that he did them as a Judge of Record; those done by him, sitting in a Court of Justice, subject to a superior review. This he says, is the reason of the rule; by this he defines and limits its extent. —Not protecting every act of a Judge; but those within the reason of the Rule, done in Court, subject to review. In *Groenvelt* v. *Burwell* and others, 1 *Salkeld* 396. Trespass against the Censors of the College of Physicians, who had fined, and imprisoned the Plaintiff, it was held by *Holt C. J.* " That being Judges of " the matter, what they have adjudged is not traver- " sable; and the Plaintiff cannot be admitted, to " gainsay what the Courts have said by their Judg- " ment—but if a Constable commit a man, for a " breach of the peace; in his presence, when there was no " breach of the peace that may be traversed; for he is " not a Judge, nor does he act by Judicial Authority; " though he has power to commit; for he does not commit " for punishment, but for safe custody."—Characterising the acts to be judicial, or not, and entitled to protection, as it was done for punishment, or for safe custody—He thus goes on, " a Judge is not answerable, either to the " King, or the Party, for the mistakes, or errors of his " Judgment, in a matter of which he has jurisdiction"— not, that he is not answerable for any act; but for the mistakes, or errors of his Judgment, in an act of jurisdic-

tion. Further he says, " it would expose the Justice of " the Nation, and no man would execute the office, upon " peril of being arraigned by Action or Indictment, for " every Judgment he pronounces—If a Justice of the Peace " record upon his view, as a force, which is no force, it " cannot be called in question, either by Action or Indict- " ment.—A Judge recorded a finding of trespass, felony; " yet would not be punished by Indictment, or otherwise, " because he was Judge of Record; and the Indictment " against him, was to defeat his record, by avowing " against what he did, as Judge of Record," expressly confining the privilege to Recorded Acts, to traverse which, would be to defeat the Record, and which if erroneous, might be reviewed, and reversed, upon appeal to a superior Court. The same Case in Lord *Raymond* 467, " the " difference is, that he [the Constable] does not commit " for punishment, but for safe custody. So Commissioners " of Bankrupts may commit a man for refusing to be ex- " amined, concerning the estate of the Bankrupt; but " they are not Judges, and their proceedings are traver- " sable, because the power of commitment is only *quous-* " *que*, &c. but, where a man has power to inflict impri- " sonment upon another, for punishment of his offence, " there he hath judicial authority;" Try this Case by this rule—this Warrant was to apprehend, and bring before, &c. that he might be dealt with, according to Law; it was not to inflict punishment of an offence—it was not an act of Judicial Authority. Again, see the same Case in *Comyns's* Reports 79, 80, " true, it is, that if a Justice of " the Peace issue his Warrant, to imprison the party; or " to arrest him, until such time as he can be brought " before him; or if a Commissioner of Bankrupt, commit " a witness for refusing to be examined, it may be deter- " mined in an Action: whether they have pursued their " authority or not; for their act in this respect, is only " Ministerial, and the commitment is not intended as a " punishment, but only as *mesne* process, to bring the " party to justice, or to make him do his duty."

Here surely my Lords, I might safely rest this argument, and rely on this case, describing, as it does, the very act before the Court, as Ministerial, and as the proper subject of enquiry in an Action—But my Lords, on so very impor-

tant a question, I feel, that I should not suppress a single authority; or omit one Case, bearing upon the matter, at argument. *Hamond* v. *Howell*, 2 *Mod.* 218, was an Action of false-imprisonment; the Defendant Pleaded: "that before him, as a Commissioner of *Oyer* and *Terminer* at the *Old Bailey*, *Penn* and *Mead* had been indicted for going to a Conventicle, and that, this was "tried by a Jury, of which the Plaintiff was one; that "they [the Jury] acquitted the Prisoners; and because "the Plaintiff *malè se gesserit*, in acquitting them, both "against the direction of the Court, in matter of Law, "and plain evidence, the Defendant, and the other "Commissioners then on the Bench, fined the Jury "40 marks a piece; and for non-payment, committed "them to *Newgate*. The Plaintiff replied; *de injuriâ, &c.* "*absque hoc*, that they acquitted against evidence;" To this replication there was a Demurrer. *Curia* (amongst other matter) "the Court at the *Old Bailey* had jurisdiction of the Cause, and might try it; and had power to "punish a misdemeanor in the Jury—They thought it to "be a misdemeanor in the Jury, to acquit the Prisoners: "which, in truth was not so; and therefore it was an "error in their judgments, for which no action will lie— "No authority has been urged, of an Action brought "against a Judge of Record: for doing any thing *quatenus* a Judge—Though they [the Defendant's] were "mistaken, yet they acted Judicially; and for that reason, no action will lie against the Defendant." There was an Act in open Court; on the Bench; a punishment; a matter of Record, reversable by *certiorari* or *Habeas Corpus*; and afterwards actually reversed by the Kings Bench; in no respect like the present Case. So in 8 *Co.* 12, Dr. *Bonham's* case, "there is a difference, where "one makes a Record, as a Judge; and where he does an "act under a special authority." So in 12 *Co.* 23 *Floyd* v. *Barker*; called, the Case of Conspiracy, "the Judge "cannot be charged for Conspiracy, for that which he "did openly in Court, as Judge or Justice of Peace— "but if he has conspired before, out of Court, this is "extra-judicial." And Sir *Edward Coke* gives a reason for the rule and the distinction; "and records are of so "high a nature, that for their sublimity, they import

" verity in themselves; and none shall be received, to " aver any thing against the record itself; and in this " point the Law is founded upon great reason, for if " Judicial matters of record, should be drawn in question " by partial and sinister supposals and averments of offen- " ders, or any on their behalf, there will never be " an end of causes; and, for this, it is adjudged in the " 14th *E.* 3, 15, that a Judge who has a Commission, " viz. that is of Record, shall not be charged in con- " spiracy, which is to be understood of what he did in " Court, for the reason and causes aforesaid." Expressly confining the privilege to Judicial Acts in open Court, matters of Record, taking no distinction between a Justice of the Peace and a superior Judge. " The Judge, (he says) be he Judge of Assize, or a Jus- " tice of Peace, or any other Judge, being Judge of " Commission and of Record, cannot be charged for " that, which he did openly in Court as Judge, or Jus- " tice of Peace"—distinguishing, not the persons, but the acts.

There is another very extensive class of cases, those of Judges of inferior Jurisdiction; but the bearing of them does not appear to me, to apply materially to this matter, and I shall therefore not trouble the Court with them. What then is the result, of the series of cases that I have cited? That a Judge of Record, is not answerable for any Judgment pronounced, or Judicial Act done in open Court, and matter of Record; not, that every act of every Judge, is a Judicial Act—nor every Act, done by virtue of an Authority, derived from his character of Judge, is Judicial: and therefore sacred and unimpeachable.—Judicial Acts appear from the Authorities I have laid before the Court, as well as from reason, Acts of Judgment; done in open Court; in the presence of the party—upon discussion—in view, and under the Controul and Sanction of public observation and opinion—before the Bar—when the party has been heard, and had the assistance of Counsel—where the Judge exercises the proper function of a Judge, and pronounces a solemn judgment, which is entered upon Record, which if it be erroneous, may be corrected and reviewed in a Court of

Appeal. No case, that I have been able to discover, goes a jot further; or protects a Judge, for any act done out of Court, and which is not matter of Record. Almost every Case does expressly confine the privilege, to his judgments upon the Bench. From these Cases we may therefore learn, what Judicial Acts are—Judgments. We find the distinction expressly taken between those acts, which are expressions of judgment, and infliction of punishment; and those, where the same physical restraints are merely Ministerial, and auxiliary to future investigation. We find, that if a Justice of Peace record that upon his view, as a force, which is no force, and commit for a punishment, he cannot be drawn in question; because he is a Judge; and the Indictment would defeat his Record, by averring against what he did as Judge of Record—but if the same Justice of Peace issue his Warrant to apprehend the party, or to imprison him, until such time as he can be brought before him, it may be determined, whether he has pursued his Authority, or not, in an Action; for his act in this respect, is only Ministerial; and the commitment is not intended as a punishment, but only as *mesne* process, to bring the party to Justice. Here your Lordships have the distinction between Judicial and Ministerial Acts taken, and the very Case at Bar instanced as a Ministerial Act; and proper matter of enquiry, and examination in an Action.

My Lords, I do not think this distinction can be rendered more clear, by any argument, or illustration. Without any disparagement to the Court of Kings Bench, or its Judges, I contend that no real distinction can be established, between the Case of the Chief Justice, and that of the Justice of Peace; each of them is Judge of a Court of Record—each of them may punish on his view—or he may issue his Warrant to Apprehend the Party; till such time as he can be brought before him, to be dealt with according to Law; to be bailed or committed for future trial—each of them possesses and exercises this Authority in the same right, as Conservators of the Peace—what is Ministerial in the one, cannot be Judicial in the other—and though the one may have higher privileges, and more important functions than the other, they cannot alter the quality of this act; and render that which is Ministerial in its na-

ture, judicial in a particular instance; or a particular individual—Let us refer to the Cases I have Cited, for the characteristic of a Judicial Act, and see does the subject of this Action possess them. Is this Warrant, matter of Record? Was the act done in Court? Does it pronounce a Judgment? Does it inflict a punishment? Does it even affect to decide upon the matter of fact, and ascertain the commission of an offence? Does it not purport to be purely ministerial, and auxiliary to a future Trial, and investigation by the Court of King's Bench? If then, my Lords, it possesses none of the qualities, which in the several cases, protect the acts of Judges; by what Authority is it entitled to protection, and privilege? Does it come within the principle of any Case? Is it in its nature, Judicial? What quality of those, which combine to form the character of Judicial, has it? Done behind the back of the Party—without notice—without investigation—*ex parte*—out of the Term—out of Court—in a corner—in the chamber of a house in *Merrion-square*—Mr. *Taaffe* unapprized, till arrested—when present, not allowed to enter on his Justification—denied the assistance of Counsel—The learned and Right Honourable Defendant himself declaring, that he could exercise no discretion on the subject, but must commit or bail—Was this Judicial? I do, my Lords, repeat, that this act has no circumstance to entitle it to the name of Judicial, or to protection as such. In the case of one class of Judges, it has been determined to be ministerial; and that in a class entitled to, at least as much favour and protection, as the Judges of a superior Court. The same Act must have the same qualities, when done by one Judge, as by another—both observe, Judges of Record—Justices of Peace are confessedly, liable to enquiry by Action, for such Acts. Judges of any Court, can claim protection for Judicial Acts only. This is not a Judicial Act, nor entitled to protection, and exempt from investigation in a Justice of Peace—I do therefore ask for proof of that, which is to create a distinction between similar Acts of persons, both Judges of Record; to afford one the protection which the other cannot claim. His superior dignity is out of the question. No rank or station as such, is beyond enquiry. I can discover no other ground of distinction—The Judges

of the *King's Bench* are Justices and Conservators of the Peace, for the Kingdom; and have their power in that capacity. This Plea would not protect this Act, by a Justice of the Peace: because the Act was not Judicial, but ministerial. The Act then is not Judicial; then the Plea cannot protect the Chief Justice. If any distinction ought to be adopted, it should be against him, whose superior learning and information must have apprized him of, and should have guarded against the impropriety of this illegal Act. I am sure there are no peculiar circumstances in this Case, to withdraw it from the general rule, and entitle this Defendant to peculiar indulgence. But it may be said, (and what may not be advanced, by those who shall argue in support of this Plea) that the Plea states the Act to have been done as Chief Justice, and the Demurrer admits that, and we are now concluded on that point; that we cannot now dispute, that the Right Honorable and learned Defendant acted in his Office of Chief Justice, judicially; that we should have traversed that fact.

What, my Lords, is it a question of fact? Is that an issue for a Jury? Is a Jury to determine the extent and limits of the Authority, and office of Chief Justice? Could we have given in evidence, that the Defendant declared, he acted merely as a Justice of the Peace; and call on the Jury to say, that his office of Chief Justice did not protect the Act? Could we have called on them, to find, that this was not a Judicial Act, and had not those legal characteristics, which entitle it to Judicial privilege, and exemption from enquiry. No, my Lords, that is a mere question of Law. The Law describes by certain and well known qualities, and circumstances, those Acts of Judges, which its policy and wisdom privilege, and declare sacred. Whether this Act, as set forth on these Pleadings comes within that description or not, is a mere question of Law, and not of fact; and the allegation, that the Defendant did this, as Chief Justice, is utterly immaterial, if it shall appear to your Lordships, that as Chief Justice, he has no peculiar authority to Warrant it, nor any peculiar privilege to exempt him from responsibility for it. Has the Chief Justice of the *King's Bench*, then, such a privilege? Are his acts, of what kind soever, sacred and exempt from enquiry, or

investigation? Is there any character in his office, or station, to distinguish him, from every other man in the land; to confer general impunity for his conduct, and set him above the law? He who is beyond enquiry of the law, is above the law. My Lords, I have been unable to discover any trace of such an Authority, of a privilege so alarming. I have looked with some industry, through those books, which treat of the Judges of the *King's Bench*, and their office, and privilege, in vain, for any principle, or Case, or even *dictum*, to sustain such a claim! A claim so extraordinary, so repugnant to general feeling, and constitutional principles, that if it existed, could not fail to have attracted the especial notice, and observation of my Lord *Coke*, and of the writers on Crown Law, who preceded, and followed him. I find it laid down in the Case of the *King* v. *White*, "that the Judges of the "Court of *King's Bench*, have power to grant Warrants "to be executed, by all Constables throughout *England*, "and that it is an offence in the Constable, to disobey "the Warrant."

My Lords, I do not dispute that power. I only contend, that they are, in common with all their fellow subjects, responsible for abuse of the power, entrusted to them; and I find no authority to sustain an exception in their favour, from the universal principle. The only passage I have been able to discover any where, that could afford a colour to the argument, which would sustain such an exception, is in 2 *Hale*, 61 *page* 5; a passage which though at first sight, it may seem to give some foundation for that argument, will on examination, be found by no means to warrant it, nor to relate to the subject before the Court, the passage is; "Now concerning "the Judges of the *King's Bench*—they are in their per-"sons Conservators of the Peace throughout *England*, "without any other commission; and any of them may "issue out their Warrants, for apprehending of a Male-"factor, or for surety of the Peace, in any County of "*England*; namely, to apprehend, and bring him before "a Justice of the Peace, in the County where he is appre-"hended; and this Warrant is directed, under their "hand and seal to Sheriffs, Constables, and other of-"ficers. Each Judge of that Court has a tipstaff attend-"ing him, being a deputy to the Marshall, for the execu-

" tion of his office, in that special service; and the Chief " Justice, or any of the other Judges of that Court, may " by the Custom of that Court, *ore tenus*, command the " tipstaff to apprehend any person, for matters of misde- " meanors, relating to the Court, or other misdemeanors, " and bring him before him; and such arrest is justifiable " without other Warrant, and without shewing the cause. " *T.* 11 *Car. B. R.* 2 *Roll. Abr. p.* 558, *Throgmorton* " and *Allen.*"

What, my Lords, is the amount of this passage? That the arrest is justifiable without Warrant, and without shewing Cause—by whom?—By the officers—Not, that the Chief Justice may issue his Warrant, without Cause, and not answer for the injury; but that his officer may justify the arrest by his command; and need not shew the Cause of that command. This is quite manifest, when we look into this passage, in my Lord *Hale's* book, which is not given us, as his opinion, the general result of his consideration on the subject; but as an abstract of a Case in *Rolle's abridgment.* He gives the abstract, and closes it with the reference to the book, from whence it was taken. Now what is the Case in *Rolle?* I will read the entire of it to your Lordships; it is in *title trespass c. pl.* 2; " In false imprisonment against a tipstaff of the " *King's Bench*, for imprisoning him for three months; if " the Defendant justify for six hours for this: that he was " servant to Sir *John Lenthal*, the marshall of the *King's* " *Bench*, and appointed by him, to execute the command " of the Chief Justice of the Court of *King's Bench*; and " that afterwards, on complaint of *T. S.* to Sir *Thomas* " *Richardson* then Chief Justice, against the Plaintiff, " according to the custom in such Case, for the Chief " Justice for the time being, from time *&c.* used, the " said Chief Justice, commanded the said Marshall, that " he should take the Plaintiff, and him safely keep, so " that he should have him before the said Chief Justice, " wherever, *&c.* to answer to, and on those things which " should be objected to him, on the part of the said Lord " the *King* in that behalf; by force of which Warrant " he took the Plaintiff, as servant to the Marshall, and by " his command detained him, for the said space of six " hours, and afterwards, at the end of six hours delivered " him to the said Marshall, safely to keep until *&c.*

" This is a good justification, although the Warrant was " by parol, and not in writing: this being by custom; " and it may be greatly prejudicial to the Kings service, " to express the Cause in the Warrant; and although the " Warrant is so: that he should have him before the " Chief Justice whenever *&c.* still it is good; for it is usual " in Warrants to Sheriffs to be with an *&c.* and the sig- " nification of the word whenever *&c.* is whenever the " party who complains, will complain against him; and " although the Defendant makes no answer, what the " Marshall did with him, after his delivery of the Plain- " tiff to his custody; but only says, that he knows not " of it, still the Plea is good; for if the Marshall after- " wards detain him unjustly, still the Defendant is excused, " because he acted legally for the time before, *P.* 11. *Car.* " *B. R.* between Sir *G. Throgmorton* and *Allen*, adjudged " upon Demurrer." What is there in this Case to sus- tain the assertion, that the Chief Justice is not responsible for abuse of his power, or that he may imprison at his discretion, and without accusation, and not answer for it?

Your Lordships will observe, that this justification was pleaded by the officer who executed the command, the tipstaff, and sent by the Chief Justice who issued it; and there is no distinction better established, than that between the officer who executes, and the Magistrate who issues the Warrant—The officer must obey the Warrant, or be at- tached—He cannot enquire into its foundation, and deter- mine, whether there was information sufficient or not;— his duty is to pursue, and fulfil the mandate of the Magis- trate, as it is that of the Sheriff, to obey this Court. The Warrant, it has been decided, need not contain the charge; it is frequently deemed prudent, to conceal the charge, until the party be secured, lest if apprized, he might escape. Then in any Case, the utmost an offi- cer can state is, that he had a Warrant—whether that was founded on information or not, he cannot declare—and it would be absurd to require him to prove, or plead it. This distinction is founded in reason and good sense, and is re- cognized by the soundest authorities—So long ago as the 14 *H.* 8. 16,—it was held, " that though the Warrant " was illegal, still the Bailiff who executes the Warrant,

" cannot be punished: for every Justice of the Peace, is " a Judge of Record, and he has a Seal of Office; and " when he has made a warrant under his Seal to his " Bailiff, the Bailiff ought to give belief to the Seal: for " it is his Authority, and he is but an Officer, and cannot " argue the Authority of the Justice, more than the " Sheriff can argue our Authority." There the Court were clearly of opinion, that the warrant of the Justice was illegal, but held the Officer justified; so that your Lordships see, the justification of the Officer, by no means includes or implies the justification of the Magistrate. This Principle is recognized in several later Cases, particularly in *Willes* 35, and in *Olliet* and *Bessey's* Case, cited 2 *Lutwyche*, 1568; so in 10 *Co*, 766; and in *Hill* v. *Bateman*, 1 *Strange*, 710, which was an Action against *a Justice and a Constable*, for false imprisonment, the Chief Justice (Lord *Raymond*) was of opinion " that the " Action well lay against the Magistrate; but as to the " Constable, who executed the warrant, it was agreed, " that the warrant was a sufficient justification; it being " a matter within the jurisdiction of the Justice of Peace." Here the distinction was acted upon—In the same Case, " the warrant justifies the Officer, and fails to excuse the " Magistrate." On these Authorities, it is quite clear, that the Plea in question, would justify the Officer; and it is as clear, that it would not, therefore, justify the Magistrate, if it had been issued by a Justice of Peace; why then, should it justify the Chief Justice?

Now, my Lords, does the Case from *Rolle* go one iota beyond this? There was a Justification, which (supposing the Magistrate a Justice of Peace, instead of Chief Justice,) would have protected the Officer—That does not prove that it would protect the Justice of Peace—How does it prove that it protects the Chief Justice? It was determined in that Case, that the warrant by *parol* was good; and though it expressed no cause—and though it ran, whenever, &c.—And this too was on the custom—It was not determined, that the Chief Justice had sufficient cause to issue his warrant; or that if he had not, he was not responsible for the arrest. Observe too, my Lords, that the Plea there, alledged information and complaint, not by way of recital, but by positive, distinct, and traversable averments. The

Case goes no farther than the common justification, under the warrant of a Magistrate; and no more establishes the impunity of the Chief Justice, than of the Justice of Peace. See *Com. Dig.* vol. 4. 379. As to the Case from *Rolle*: the Case determines, that the Tipstaff was justifiable in making the Arrest, and that he is not bound to shew the cause; and so the words, in my Lord *Hale's* Work, abstracting this Case, must be understood; and not as generally asserting, that the Chief Justice may arrest whom he pleases, and justify, without shewing any cause. Lord *Hale* is merely giving the Case from *Rolle*, not his own opinion. His words must be referred to that Case, and cannot be strained, beyond the subject matter, to the general and unconstitutional doctrine, that any man has power to abridge the personal liberty of any individual, without the explicit permission of the Law. The Case itself proves nothing, but the justification of the Tipstaff—and by no means the irresponsibility of the Chief or other Judge of the *King's Bench*, for the illegal imprisonment of a fellow subject; and no instance from that Case, can go beyond that single conclusion, which I do not dispute.

My Lords, I have searched with the utmost industry, that I could command, the authorities on this subject. In neither *Coke*, *Hale* nor *Hawkins* have I found any position, to sanction or warrant the assertion: that the Chief Justice of the *King's Bench*, has any privilege, or exemption, from answering for an abuse of his power, when the Act is Ministerial, and not Judicial.—But I have cited every Authority, that appeared to me to bear upon this part of the case; and I do humbly contend, that this Plea is insufficient—that it ought to have shewn, that the Right Honorable and learned Defendant suspected the Plaintiff, of some offence; and further, to have set forth the case, which induced him to have such suspicion: that this Court might judge, whether he had a sufficient ground for his proceedings;—that on this Pleading it must be taken, that the Defendant did imprison the Plaintiff, without reasonable, or probable cause, contrary to the Laws of this Realm; that the act has no colour of Judicial proceeding; and that, notwithstanding the high

rank, and dignified station of the Right Honorable and learned Defendant, my client is entitled to retribution at his hands, for the injury he has sustained from the act. I rely, that I have demonstrated this, by the authorities I have laid before the Court—and I maintain, that if I stood without a single case, or *dictum*, that it is an utterly untenable position: that any man in this Land, is armed with the enormous and alarming power, to apprehend and imprison at his discretion, or his caprice. If this Plea be good, such is the power claimed by the Chief Justice—if his Warrant establishes and Justifies itself, what check is there upon his conduct—He may issue a Warrant reciting a felony, and commit without Bail, or Main prize; and he is not answerable, whether his allegation be true, or false. Does not the monstrous assumption recoil, and overset itself? Have we forgotten the principles of our Constitution? Or do they no longer exist? The universal principle of responsibility in every office of the State—the proud principle of our Law, that there is no wrong without a remedy; no injury without redress; that the personal liberty of no individual can be abridged, at the mere discretion of any Magistrate, without the explicit permission of the Law.—Are these ideal and imaginary?—They are, if any person, or set of persons have this power, this despotic, this arbitrary, this unconstitutional authority—No matter by whom exercised—absolute power is always abused—No rank can insure integrity—no station is above corruption.—History proves that the Bench of Justice itself is not—Judges are but men, and equally subject with their fellows, to the frailties of human nature. Not to the highest Magistrate the law knows, can such authority be constitutionally or with wisdom confided. 'Tis to beg the question to say, that this power in such an officer will not be abused: that it may be safely entrusted to the discretion of a Judge. My client complains, that it has been abused, and much abused; that his liberty has been unlawfully violated in his person, on the Warrant of the Right Honorable and learned Defendant; that when he was, without any reasonable cause, used like a felon, against the Laws of the Realm, imprisoned, and brought in custody through the streets of this City, there was a gross abuse of power,

and infringement of right. No, my Lords, our freedom is not dependant on any man's discretion—We boast, not that power will not, but that it cannot be abused. We rest in security under ascertained and fixed Laws, not on the disposition, or judgment of any individual in any station—What is that discretion, to which we are summoned to surrender our Laws, and our persons?—Where can we trace its limits? How define its extent? On what principles is it regulated? By what ordinances is it corrected? One of the wisest lawyers that ever presided in *Westminster Hall* pronounced of it thus, from the Bench—"The discre-"tion of a Judge, is the law of tyrants—it is always un-"known, it is different in different men—it is casual, and "depends upon Constitution, temper, and passion;—in "the best it is oftentimes caprice; in the worst it is every "vice, folly and passion, to which human nature is liable." So, my Lords, did that great man think, and speak of the discretion of Judges. Let us not then be abused by phrases—Uncontroled irresponsible power is tyranny, whereever lodged; such power is unknown to our Constitution—It is incompatible with its most established and acknowledged principles. Its consequences are alarming beyond calculation. I do therefore rely, as well upon the authorities I have cited, as upon general reason, that the doctrine of this Plea cannot be sustained, but at the expence of a vital and essential principle of the Constitution, and the established and well authenticated rules of Law; and that even upon this first objection, the Demurrer ought to be allowed.

MR. J. LESLIE FOSTER.—I feel, my Lords, as a high honor, the duty which devolves upon me this day, of appearing before your Lordships, as Counsel for the Lord Chief Justice of *Ireland*, in an Action brought against him, for imputed error, or imputed misconduct, (I know not which it was intended to designate,) in the discharge of one of the most important functions of his high office; but I feel that honor, however great, to be even subordinate to the importance of the duty; and much, indeed, would I lament, that the office of arguing this Demurrer should have been consigned into my hands, if I did not also feel, that even the importance of the duty, is For the Defendant.

inferior to the facility of its execution: since, if I do not much mistake, I hope to convince the Court, that the Case of my Client is such, that, in the hands of the feeblest advocate, it could not be exposed to a possibility of failure. But, before entering upon the various heads of legal argument, into which the consideration of the Question necessarily divides itself, I beg to observe upon the singular fortune, which has attended the progress of the cause itself; and to applaud, or to admire, the whimsical singularity of the circumstance, that an Action commenced, as we have been assured, in no spirit of personal hostility, nor, in any desire of exciting, or sustaining the feelings of popular agitation; but simply, and soberly, for submitting the construction of the Convention Act, to a course of Judicial determination, and this for the mere purpose of vindicating, the antient rights of Parliamentary Petition, in their modern dress of Parliamentary Representation, should, at length, have been conducted by its managers, to an issue in Law, in which, neither the Convention Act, nor the Right of Petition, nor the mode of its exercise, nor any thing Protestant, nor any thing Catholic, could possibly enter into consideration. No, my Lords, it is wholly another point, which is now submitted for your decision; and, which has, at least, the circumstance of novelty to recommend it: it never having been before decided; because, in all the varieties of popular feeling, it never had been before questioned.

Mr. *Perrin*, has truly stated the Pleadings. An Action for false imprisonment, is brought against the Chief Justice. To this he pleads; that he was duly appointed, and is Chief Justice; and that, as such, he issued his warrant, and caused the Plaintiff to be apprehended, and brought before him; and then delivered him to bail for his appearance. This Plea says nothing of the informations sworn; nor even does it aver the fact, of any informations having been sworn at all. No, my Lords, this Plea was put in, (and it is right, that it should be so understood by the Public,) not at the advice of the Chief Justice, nor perhaps, as most congenial to his private feelings, but by the unanimous advice of all his Counsel, who felt it their

bounden duty, and a debt due to his high station, to allow none of its powers or authorities to be assailed with impunity in his hands; and in this novel attempt, this single, and solitary, and unprecedented instance, of an Action brought against a Judge of one of the Superior Courts, for the discharge of any of his functions, to resist what they all considered as a monstrous aggression upon the Courts of public Justice, and fairly to put to your Lordships the Question, whether such an Action will lie at all. My Lords, we rely on it, that no such Action can be endured; and that, without entering into the various voluminous and complicated Questions, which my friend Mr. *Perrin*, in his argument, has proposed, your Lordships will feel, that you have nothing else to do, than at once to put the Plaintiff out of Court. I shall rely on two propositions—The first, "that no Action will lie at "all against any Judge; and *a fortiori*, not against a "Judge of any of the superior Courts, for any Act done "by him in the execution of his Office, in any matter "whereof he has jurisdiction." That is a proposition, which I think, your Lordship's cannot question at all; and having proved this, I shall then discharge the more pleasing task of shewing, that even if you could question it, you would find that my Client has only acted as he ought: that what he did, of right he did it:—that he did not transgress in aught, the powers which the Constitution, in its high confidence, entrusts to his Office for the public good. We shall not flinch from this part of the Question. We shall maintain, as our second proposition, in all its latitude, that the Chief Justice "may "issue his warrant, and apprehend whom he pleases, and "hold him to bail;" and that if he does so erroneously, the Party may be discharged by *Habeas Corpus*; but has no other remedy—that in the hardly supposeable Case, of a Chief Justice using such a Power, as an instrument of corrupt or designed oppression, the remedy must be sought by complaint to the King in Parliament, but in no instance from your Lordships. Such, my Lords, are the only Questions now for consideration, foreign altogether, as I have said, from the originally avowed objects of this Action; Questions, if not of much practical utility, at least some speculative curiosity: or I will admit,

of more than mere curiosity; for at a time, when to attack whatever is established and to humble whatever is exalted, is the order of the day, interesting indeed, and perhaps interested is the Enquiry, how far does extend, or rather how much may be circumscribed, the Authority of the first criminal Magistrate of the Land.

To establish then the first proposition, that this Action will not lie at all. I did trust, when I came into Court, that we were in possession of Cases, quite decisive upon the subject; and I cannot express the astonishment, with which I heard not a few of those very cases, relied on by my friend Mr. *Perrin*, for the establishment of his own Argument.—Well he knew, what pressed upon his case: and at first I thought, that perhaps he hoped to impress upon your Lordship's mind, that these very Authorities were legitimately for him, and that in our mention of them, we should endeavour merely to distinguish them away. I shall pursue them pretty nearly in the same order; but I shall point out to your Lordships, some singular omissions in the Citations from them already made. First then, in the case of *Floyd v. Barker* 12 *Co. Rep.* 23: that was indeed an Action of Conspiracy, brought against a Judge of the Grand Sessions of *Wales*, and against a Grand Jury for the imputed murder, in the shape of a legal condemnation, of a certain gentleman in *Wales*; but Mr. *Perrin* has not stated the manner, in which Lord *Coke* tells us that the Complainant was received.—" It was" says he, " ordered, " and adjudged by all the Court, that the said Bill, " without any answer to it be taken off the file, and " utterly destroyed; and it was agreed, that, in as much " as the Judges of the realm have the Administration of " Justice, under the King, they ought not to be drawn " in question, for any supposed corruption, or for any " Judicial proceedings before them, or tending to the " slander of the Justice of the King, which will trench " to the scandal of the King himself: except it be before " the King himself. They are only to make account to " God and to the King, and not to answer any suggestion in the Star Chamber; for this would tend to the " scandal, and subversion of all Justice; and those who

" are the most sincere, would not be free from continual " calumniations." The Marginal annotator, upon the words " to God and the King," makes a query :—" query " also to the Parliament." He makes no query: whether he is responsible also to the Common Pleas.—Such a query, indeed was never made, except by the present Plaintiff. But Lord *Coke* in what follows, clearly shews, that, by the account to the King, he means the King in Parliament: for he goes on to state, that Chief Justice *Weyland*, and Judge *Hengham*, accused of bribery and corruption, had their causes determined in Parliament; and he cites the Case of the Judges of *Traylbaston*, in *Edward the Third's time*, which was examined before the King in Parliament, and not by force of any Commission; and he says, that *Thorp's* Judgment, who was drawn in Judgment before Commissioners, was held to be against law: and upon that he was pardoned; and it is contained in the same record, that it shall not be drawn into precedent. Such, then, is the Case of *Floyd* and *Barker*. Such are the circumstances which Mr. *Perrin* has omitted to mention.—Their true bearing upon the present question, is for your Lordships to determine.

But I find, my Lords, a still older authority, in which the language of the Constitution is, that Parliament is the tribunal for such a complaint; and that the King in Parliament is the proper reformer of the abuse.—It is thus entered in the Parliamentary *Roll* of the 1*st* year of King *Henry 4th*. " The Commons pray, that the Lords, spi-" ritual and temporal, nor the Justices, be not received " hereafter for their excuse, to say, that they do not dare " to say the law for doubt of death." And it is answered: " That the King holds all his Lords and Justices, for " good, sufficient and loyal; and that they will not give " other Counsel or advice, but what is honest, and just, " and profitable for him and the Realm; and if any will " complain, in especial, in time to come, the King will " cause to reform and amend." And therefore when Mr. *Perrin* asks, whether there is any wrong, for which the Constitution has provided no remedy I will say, that there are wrongs, which the law will not presume to be possible, and for which, for that reason, no remedy is pro-

vided. If a *King* of *England* should stab one of his subjects, I would ask Mr. *Perrin*, whether the Law has provided any, and what course of punishment for the offence? And as well might we be told, that on account of the decent omission of the Law in this particular, the life of no man in *England* is secure, as that the liberty of the subject is an empty sound, if the doctrine I contend for, be indeed the language of the Constitution. I would say so, if indeed I were contending for the absolute irresponsibility of the Chief Justice; but is that the Case? No, my Lords, I only deny, that he is to answer to this tribunal. If there is a man alive who believes, that Lord Chief Justice *Downes* has acted through injustice, or oppression, to Parliament let him bear the tale. If he believes him on the contrary, to have detained any man in prison through error, let him apply to the Court for his *Habeas Corpus*; and if he were founded, the error would be corrected; but let him not in such Case, by loud language, misrepresent the few hours of intermediate detention, in a Case, which the Law will not suppose to be a destruction of *British* liberties.

The next Case relied on by Mr. *Perrin*, was the Case of the *College* of *Physicians*, reported in 8*th Coke* 212; but here again I have to lament, that the true point of that Case, was not stated to your Lordships.—That was an action of false imprisonment, brought by Dr. *Bonham* against the *London College* of *Physicians*. They had fined and imprisoned him, for practising in *London* without their licence. His defence had been, that he was a Doctor of the University of *Cambridge*, and that as such, he would practice in spite of them.—Lord *Coke* was himself the Judge in that Case.—All his academic feelings were roused into activity; particularly in the Case of his own *Alma Mater Cantabrigi*; and yet with this anxiety, and I must say, even with that bias, which perhaps makes this Case of less authority, than almost any other in his reports, what is the ground, on which he seeks to save the *Cantabrigian* Doctor from the *London* Physicians?—He allows the cause of their commitment to be traversed; and for what reason? Why expressly, [I use his own words] "because" says he, "they are not made Judges, nor a

" Court given to them, but have only an authority to do " it; so" says he, " there is a difference, when one " makes a record, as a Judge: and when he doth it by " special authority, and not as Judge." That is, my Lords, that had the College of Physicians been clothed with the Judicial authority, Lord *Coke*, with all his prepossessions, could not have allowed them to be questioned in an action for false imprisonment.

Such then, is the case, which Mr. *Perrin* gravely hopes to persuade your Lordship's, is favourable to his Client. But well might he have hoped so, when we consider the next authorities on which he relies—*Hamond's* case, and *Bushell's* 1. and 2 *Mod.* There are indeed circumstances connected with them, which have not been stated to the Court. In the 29th year of *Charles 2nd.* a time of great popular excitation, *Howel* the Recorder of *London*, had fined and imprisoned a Jury, for finding a verdict contrary to his directions, and in his opinion, contrary to the evidence before them. *Hamond* and *Bushell* were too of this Jury.—*Bushell* applied for his *Habeas Corpus*. The Court will find the matter reported in *Vaughan* 135; and Sir *Thomas Jones* 13. Before all the Judges of *England*, the imprisonment was held to be clearly illegal, and he was liberated; but *Bushell* was not satisfied; he was a good citizen: and determined, for the sake of his country, to make an example of the Judge, that none might offend in like manner, in future. He therefore brought his Action for false imprisonment, in the *King's Bench*. Unfortunately however for his purpose, the enlightened mind of *Hale* presided in that Court; and how did he receive the Action? Mr. *Perrin* has not told your Lordship's, but I will. On an application for time to plead, he says: " I speak my mind plainly, that an Action will not lie; " for a *Certiorari* and a *Habeas Corpus*, whereby the " proceedings are removed here, are in nature of a Writ " of Error; and in case of an erroneous judgment given " by a Judge, which is reversed by a Writ of Error, shall " the party have an Action for false imprisonment against " the Judge? The *Habeas Corpus* and the Writ of Error, " though it doth make void the Judgment, doth not " make the awarding the process void to that purpose

" and the matter was done in a Course of Justice:—they " will have but a cold business of it." These were the words of *Hale* on this occasion. Your Lordship's will find it reported in 1 *Mod.* 119, and also in 3 *Keble* 332. This is exactly the doctrine I have been contending for, that in case of the Judge's error, a *Habeas Corpus* is the party's only remedy. Lord *Hale's* prediction, that the party would have " a cold business of it," seems to have had a due effect upon *Bushell's* mind; and we find from another case in *Lutwyche*, that this action was discontinued; but his fellow prisoner *Hamond*, determined to try whether the Court of *Common Pleas* might not be more favourably inclined; and your Lordship's will find the manner in which they received him, reported in 2 *Mod.* 318. another of the Authorities which Mr. *Perrin* has pressed into his service. But let us first observe, that in this case, it was not a matter of any doubt, whether the imprisonment were false or not. All the Judges had recently determined, that the imprisonment of this very individual *Hamond*, was directly illegal; and yet how do they entertain his Action? In the words " of the Reporter, the whole Court were of opi- " nion, that the bringing of this Action was a greater " offence, than the fining of the Plaintiff and commit- " ing him for non-payment; and that it was a bold at- " tempt, both against the Government and Justice in " general. The Court at the *Old Bailey*," say they," " had Jurisdiction of the Cause, and power to punish a " Misdemeanor in the Jury; they thought it a Misde- " meanor in the Jury to acquit the Prisoner, when in " truth it was not so; and therefore, it was an Error in " their Judgment, for which no Action will lie.—How " often are Judgments in this Court reversed in the *King's* " *Bench*; and because the Justices are mistaken in their " Judgments, must that needs be against *Magna Charta*, " the Petition of Rights, and the liberty of the Subject. " These be mighty words in sound, but nothing to the " matter."

The last expression of the sentiments of the *English* Courts, which I have found upon this subject, is the case of Sir *Francis Burdett* against *The Speaker of the House*

of Commons, 14th *East* 128. *Holroyd* is there contending, pretty much like Mr. *Perrin*, that the Speaker was liable in an Action, the Court holding that he was no more responsible, than any other Member in the House; that he and they had acted "Judicially;"—and therefore, that the Action would not lie. Mr. *Justice Bailey* presses *Holroyd* with this Question: "you have not answered "the Question, whether an Action could lie, in the "Court of *Common Pleas*, against an officer of the "Court, executing its Warrant of Commitment for a "contempt, to question the legality of its Commit-"ment; and I may also ask, whether an action would "lie against the Judges, or either of them who signed "the Warrant!" Now, what was the answer of *Holroyd?* Sorely as he was tempted, he durst not sustain the extravagant doctrine, that an action would lie against a Judge:—"Certainly no action would lie against Judges; "they are responsible in another way—No common pro-"ceedings in the ordinary way would lie against them." Two distinctions, indeed, are attempted to be established by Mr. *Perrin*; that the Judge is irresponsible, solely for such acts as he does locally in Court; secondly, for such acts as he does in his judicial capacity, as opposed to a certain ministerial capacity, which Mr. *Perrin* assumes to belong to him—Reserving for the conclusion of what I have to offer, the refutation of the former position, let me observe in answer to the latter, that I deny one principle, that the distinction of Judicial and ministerial applies at all to the acts of the Judges of the superior Courts.—That distinction seems to me, to apply to inferior officers, such as Sheriffs *&c.* and that "Judicial" and "extra Judicial" is the proper classification for the acts of the superior Judges.—By the former, I mean all acts done by virtue of their commission;—by the latter, the ordinary actions of common life. For all the former, I lay it down they are not responsible in actions at law;—for the latter, of course they must answer like other men. Your Lordships will find that *Viner*, under his title, "Judges," expressly recognizes this distinction. The acts of the Judges of the superior Courts he divides into "Judicial" and "extra-judicial;" he then lays down "in what cases other persons "than Judges of the Courts of *Westminster*, as Bishop or

" Sheriff, shall be said to act as Judges, or only as minis-
" ters." These are his very words; and from them it is as clear as day, that it never occurred to him, that the Judges of the Courts of *Westminster* could act ministerially. I would ask indeed on principle, to whom or to what is the Lord Chief Justice ministerial? I am answered, to the general purposes of Justice, but surely that is little better than a play on words; for are not all his actions, those which are most notoriously Judicial, confessedly ministerial to Justice? My Lords, it appears to me quite clear, that the Constable who apprehended the Plaintiff was the minister, and the only minister in this Case; and that the Lord Chief Justice, exercising his judgment in issuing his Warrant, was acting in his Judicial capacity. But, my Lords, even if I were to admit this distinction, is it indeed clear, that holding a man to bail is a ministerial act? I find in *Viner*, *title* " Judicial," directly the contrary. " A recognizance" says he, " is a Judicial act;" and he cites the argument in the grand case of the *Habeas Corpus* in *Noy* 157, in which this proposition seems to be admitted. Now, surely, if taking a recognizance is a Judicial act, " a *multo fortiori*," so is the determining whether, under all circumstances, a man shall be held to bail for an imputed misdemeanor.

My Lords, I have sought in vain through the whole range of our books, and so I perceive has Mr. *Perrin*, for any action against a Judge of the superior Courts, for any act that he has done either Judicial, or of such a nature, as is now contended is ministerial. This silence of our records is more decisive, than any language they could speak. In *Poole* and *Gwynne*, *Lutwyche* 938, your Lordships will find the Cases collected above 20 in number, in which actions have been brought against Judges; but it is a little remarkable, that in every instance it is in the Case of an inferior Jurisdiction. To what is it to be imputed, that they contain no example of an action like the present? And therefore, when Mr. *Perrin* argues this point, as if there were no difference between the Chief Justice and a common Justice of the peace, I must tell him, that it is a begging of the whole question. The rule extracted from all these Cases, as applied to the inferior Tribunals, is,

that when the inferior Court has jurisdiction of the subject matter, even if it exceeds the limits of that Jurisdiction to any extent, no action lies against either Judge or officer; but where there is a defect of Jurisdiction, that is, when they act in a matter not cognizable at all by them, there both Judge and officer are liable. Such is the principle clearly laid down in the *Marshalsea* Case, 10 *Coke* 69, and in *Poole* and *Gwynne*, *Ldtwyche* 935, and 1565; and in the long list of Cases there referred to. Now, even admitting that this principle is applicable to the Judges of the superior Courts, which however until proved, I must be permitted to deny, I ask would it not bear us out in this action; for is it to be questioned for a moment, whether the Chief Justice has Jurisdiction of the Peace?

And this, my Lords, leads me to the second proposition, in which I undertake to shew, that even if it were competent to this Court to question the conduct of the Lord Chief Justice of *Ireland*, you will find he has only exercised in his discretion, that power reposed in him by the Constitution; in short, that he may hold any man to bail, and answer for it to none, but the King in Parliament. The nature of his high office, is best described in Lord *Coke's 4th Institute*. I will first refer to what he says of the Jurisdiction of the Court; 2dly, of the powers of the Lord Chief Justice individually; and 3dly, of what relates to the persons of the Judges of the *King's Bench* generally. Of the 1st he says, *4th Inst.* 71.—"This "Court hath not only Jurisdiction to correct errors in Ju- "dicial proceeding, but other errors and misdemeanors "extra Judicial, tending to the breach of the Peace of "the King, or oppression of the subjects, or raising of "faction, or debate, or controversy, or any other matter "of mis-government." Strong and emphatic is the description, and wide the sphere of such Jurisdiction; and within which, I think it would not be difficult to assign to the conduct of the Plaintiff its proper place, for which the Chief Justice did in fact apprehend him, if the argument upon this second plea did indeed permit of such a discussion.—And the Judges, he says, are—"*Capitales, gene-* "*rales, perpetui, majores, qui omnium aliorum corrigere* "*tenentur injurias et errores.*" Of the individual autho-

rity of the Chief Justice he tells us, that since the time of *Edward 1st*, it is derived from the short Writ. Know " ye, that we have appointed you our Chief Justice, to hold " pleas before us during our pleasure. But this Writ, ' says " he," includes all that authority, which was truly intend- " ed to be granted to him, by the former letters patent". —We must then go back to these letters patent; *Coke* sets them out at length, *4th Inst.* 74.—They may be thus translated. " The King to the Archbishops, Bishops, Abbots, " Priors, Earls, Barons, and all other faithfull subjects " of the Realm of *England*, greeting. Whereas for our " own preservation, and the preservation of the tranquilli- " ty of our Kingdom, and for the administration of Jus- " tice to all, we have appointed our beloved *Philip Bas-* " *sett*, Chief Justiciary of *England*: we command you, " that in all things which relate to the office of the afore- " said Justiciary, and also to the preservation of the peace, " and of our Kingdom, ye attend upon him in the fullest " manner."—

Your Lordships will observe, that he is appointed for three purposes; that his office is not confined to the administration of Justice, but is also specially appointed for the conservation of the peace; and *Coke* goes on to say of the Justices of this Court generally; that " they are the " sovereign Judges of *Oyer* and *Terminer*, gaol delivery, " and conservators of the peace within the Realm." And your Lordships will find it in *Bacon's abridgment*, *title* " Justice of the Peace," citing *Dalton* and *Brooke*, that the " Lord Chancellor, Lord High Steward, Lord *Mar-* " *shall*, High Constable, and every Justice of the *King's* " *Bench* had a general authority to keep the peace " throughout the Kingdom, and to award process, and to " take recognizance." *Bacon* might have cited in addition, the more venerable authority of *Lambard's Eirenarchia*, who exactly expresses the mode of this authority, " every " Justice of the *King's Bench* have closed in their offices, " a credit for the conservation of the Peace." Your Lordships will observe the force of the expression of " having " this credit closed in their offices;"—Not derived under a seperate Commission, or as mere Justices of Peace; and *Lambard*, as if he were aware of the distinction attempted

by Mr. *Perrin*, that their credit is confined to their acts locally in Court, adds this, as if on purpose to shew its futility; " The Justices of the *Common Pleas*, and Barons " of the *Exchequer*, be Conservators within particular " places only, that is, within the limits of their respective " Courts;" of course the Justices of the *King's Bench* have this power beyond the precincts of their Court; but of this more presently. In another passage of Lord *Coke's* works 2 *Inst.* 186, in his readings on the Statute of *Westminster* the 1*st Chap.* 15, the object of which was to ascertain in what Cases thereafter men should be bailable—The Statute having recited, " for as much as before this time, " it was not determined, what persons were replevisable " and which not, but only those which were taken for the " death of a man, or by the commandment of the King, " or of his Justices, or for the forest."—Lord *Coke* on these words, " by the Commandment of the King," acknowledges the Law as laid down by an antient Judge, that " if the King commanded me to arrest a man, and " I do it, he shall have his action for false imprisonment " against me, albeit he was in the King's presence." But let it not be supposed that " *a fortiori*" the Chief Justice is under the same restraint; on the contrary, the very reason, why the King cannot do it is, that his Judges can. Lord *Coke* proceeds to tell us.—" The King being a body " politic cannot command, except by matter of record; " all matters of Judicature and proceedings in Law are " distributed to the Courts of Justice, and the King doth " Judge by his Justices, and regularly no man ought to " be attached by his body, but either by process of Law, " that is, by the King's Writs, or by indictment or lawfull " Warrant," that is, my Lords, by the lawfull Warrant of his Judges. And Lord *Coke* seems to define what that lawfull Warrant is, in his comment on the subsequent words of the Statute, " or the command of the Judges;" this he explains briefly thus, " upon any case whereof " they are Judges appearing to them.—

My Lords, a volume of commentary could not have conveyed Lord *Coke's* opinion more fully, than this short, but decisive sentence. From it we collect, that the Judges may arrest for any matter, in which they have Jurisdiction;

and that their judgment or opinion, is to be their rule of conduct: I say, within their Jurisdiction, that is, for the *Common Pleas* and *Exchequer* within their respective Courts, but for the Judges of the *King's-Bench* all over the kingdom. Thus *Lambard* and Lord *Coke* seem alike to have been unconscious of Mr. *Perrin's* distinction, that the Judges of the *King's-Bench* must act locally in Court. *Viner*, in his abridgment is, at least, of the contrary opinion: *Title Judges* 1. "Some things," says he, "which "a Judge doth act in his Chamber as a Judge of this "Court, are accounted as done in Court; for it is in "order to the proceedings in Court." And it is a principle laid down in all the books, that in time of vacation, a Judge of the *King's-Bench* may bail even for murder in his Chamber; and it was in Chamber that Lord *Mohun* was bailed by Lord *Holt*. It was in vacation also, as appears by the Pleading, that Lord Chief Justice *Downes* held the Plaintiff to bail. But Lord Chief Justice *Hale* is, of all writers, most decisive on this point; and the very act, which he selects as an example of what the Chief Justice may do out of Court, is the very act of which the Plaintiff here complains. In the 2d volume of the pleas of the Crown, Lord *Hale* says, "I shall "not at large pursue the Jurisdiction of this Court, "for it hath been done to my hands amply already;— "but I shall consider it with relation only to the capi- "tal proceedings, namely treasons and felonies, and "that very briefly, and therein—1st. concerning the "Jurisdiction of the Court in this particular; 2dly, con- "cerning the power of the Judges of this Court, out of "Court, in relation to matters of crime or misdemeanor." And after disposing of the 1st head, he says; "now con- "cerning the Justices of the *King's Bench*, they are in "their persons, Conservators of the Peace throughout "*England*, without any other Commission," [that is to say, out of Court] "and any of them may issue out their "Warrants for apprehending of a Malefactor, or for "the surety of the Peace in any County of *England*, "namely, to apprehend and bring him before a Justice "of the Peace in the County, where he is apprehended." Again; "the Chief Justice, or any one of the other "Judges in that Court, may, by the custom of that

" Court, *ore tenus* command the Tipstaff to apprehend " any person for matters of misdemeanors relating to the " Court, or other misdemeanors, and bring him before " him; and such arrest is justifiable without any other " Warrant, and without shewing the cause." Language cannot be more expressive than Lord *Hale's* opinion on this point.

Unless your Lordships are convinced, that he was totally mistaken, there is an end altogether to this case; but even, if your Lordship's should over-rule his authority and decide, that the Chief Justice has no such power as Lord *Hale* so distinctly recognizes: still your Lordship's will have done nothing for the Plaintiff, unless your Lordship's should also decide for him, that he may question the excess of authority by a Judge, in a matter of which he has Jurisdiction. And even if your Lordship's, in opposition, as I humbly rely on it, to the whole current of authorities on this point, should remove this additional impediment out of his way: still your Lordship's will have done nothing for the Plaintiff, unless you determine to apply that rule, hitherto confined to inferior tribunals, now for the first time to a superior Judge, and he the highest in the land.—And even if your Lordship's should do all this: still I do rely on it, you will have done nothing for the Plaintiff, unless your Lordship's should further decide, in disregard to whatever is most antient most venerable and most decisive in our books, that in an action at Law, rather than by the King in Parliament, the Conduct of a Judge of a Superior Court can be drawn in question.

Tuesday, November, 10th, 1812. Michaelmas Term. 53d Geo. 3d

Mr. RICHARD PENNEFATHER.—My Lords, In this Case I am Counsel for the Defendant the Lord Chief Justice, to maintain the Plea, and against the Demurrer. It will be necessary for me, to draw your attention to the Pleadings. The Declaration states the Action to be, for a trespass and false imprisonment; and my Client's Plea states, that the Defendant was arrested, &c. [*here Mr. Pennefather stated the 2d Plea at length*] My

Lords, I have to state, that such Plea has been put in by the Counsel for the Chief Justice, with the view of ascertaining the Privileges annexed to his high and dignified office. I think it necessary so to state it, that the Court may be quite disembarrassed from any personal feelings, and from giving any weight to the Pleading, which it might derive from the Character and Learning of the Defendant. The Defence has been formed by his Counsel. It is the Pleading of his Counsel;—a Pleading which they deem necessary for the due maintenance of his high office, and for the general and public weal. With a due regard to the character of the learned Defendant, his Counsel have in the third Plea, set out at length on the Record, the informations upon which he acted. Such Plea has been pleaded, not with a view to justify him to your Lordships; because they feel a confidence, that the Plea I have stated goes in full justification of the Defendant in point of Law; but that the facts being put upon the Record, his conduct may be preserved to, and approved of by future Ages. With that Plea, I trust your Lordships will have nothing to do; for the Question for your Lordships consideration is, whether the facts stated in the second plea be such, as to justify the several acts of trespass, or rather the single act of trespass complained of in the Declaration. I say, that the Plea of his authority as Chief Justice must bar the present Action.

Most of the Authorities bearing upon this Case, were cited during the Argument last Term. I will not fatigue the Court, by going through them at length; but I think this principle is clearly deducible from them: that, for what a Judge even in the lowest Court does, whilst acting in his judicial situation, and as Judge in a matter over which he has jurisdiction and arising within it, no Action lies. Such a proposition cannot be controverted. The only Question that can arise, even as to Judges of inferior and limitted jurisdiction is, was it a matter arising within their jurisdiction; but in the present Case no such Question can arise, because the jurisdiction of the Chief Justice of the *King's-Bench* is not limited by space, but reaches throughout the entire realm of *Ireland*. Of those Cases cited and so ably commented on last Term by Mr

Foster, I shall state two or three to the Court. The most remarkable of them is the case of *Hamond* against *Howell*, the Recorder of *London*, reported in 1st. *Mod.* 184. when the case first came before the Court. It was an Action of Trespass against the Defendant, for commiting the Plaintiff for some misconduct, as a Juror.—The Judge was a Commissioner of *Oyer* and *Terminer*. In *Bushell's* case, reported in *Vaughan* 135. [for *Bushell* was in the same predicament with *Hamond*] it had been decided by the Court, that the commitment was illegal; and it was on that opinion of the Court in *Bushell's* case, that this action of *Hamond* was founded. *Howell* applied for time to plead; and then the Court declared their opinion against the Action, viz: "that no Action will lie "against a Judge for a wrongful commitment, any more "than for an erroneous judgment." And *Atkins* Justice said, "it never was imagined, that Justices of *Oyer* and "*Terminer* and *Goal Delivery* could be questioned in "private actions, for what they should do in execution of "their Office; for if the Law had been taken so, the "Statute of 7 *James*, *Ch.* 5. for Pleading the general issue, "would have included them, as well as inferior Officers;" thereby taking a manifest distinction between Judges of Record, and Justices of the Peace. The same case came on again in 2 *Mod.* 218. and is as follows.—To the Action which was for false imprisonment, the Defendant pleads specially; and the substance of his Plea was, "that there "was a commission of *Oyer* and *Terminer*, directed to "them &c. and that before him and the other Com-"missioners, Mr. *Penn* and Mr. *Mead* two preachers, "were indicted for being at a conventicle, to which in-"dictment they pleaded, not guilty; and this was to be "tried by a Jury, whereof the Plaintiff was one; and "that after the Witnesses were sworn and examined in "the cause he and his fellows found the prisoners not "guilty, whereby they were acquitted; *et quia* the Plain-"tiff *male se gesserit*, in acquitting them both against "the direction of the Court in matter of Law, and "against plain evidence, the Defendant and the other "Commissioners then on the Bench fined the Jury 40 "marks a piece; and for non-payment committed them

"to *Mangtie*." And to this Plea, the Plaintiff did not as here Demur, but replied "*de injuriâ suâ propriâ*," and the Defendant Demurred. And Serjeant *Goodfellow* for the Defendant said, he admitted that "a Judge cannot fine a Juror, yet if he do, no action will lie against him for so doing; because it is done as a Judge;" and he cites the authorities. "But the Court told him, that he need not labour that point; but desired to hear the argument on the other side, what could be said for the Plaintiff." And, my Lord's, we find that *Newdigate*, *Serjeant*, who argued on the other side contended, that it was an extra-judicial act, admitting the reasoning of the other side, namely: "Because the King himself is *de jure* to do justice to his subjects; and because he cannot distribute it himself to all persons, he doth therefore delegate his power to his Judges; and if they misbehave themselves, the King himself shall call them to account, and no other person." But then it was contended, that that act, not being warranted by the Commission, was not the act of a Judge at all. The opinion of the Court was, "that the bringing of this Action was a greater offence, than the fining of the Plaintiff and committing him for non-payment; and that it was a bold attempt both against the Government and Justice in general."

It is unnecessary for me to go through the Cases reported in the books, of actions against inferior Judges;—but I here state distinctly, that there is not on record, a single instance of an action brought against a Judge of the superior Courts. In the case of *Mostyn* & *Fabrigas* in *Cowper* 172. Lord *Mansfield* says, "if an action be brought against a Judge of Record for an act done by him in his Judicial capacity, he may plead that he did it as Judge of Record, and that will be a complete Justification."—The same position is in 12 *Co.* p. 23. *Floyd* & *Barker*; and the doctrine you will find followed up, even in the Case of an action against the Sheriff as a returning Officer, in the case of *Barnardiston* a *Some*, a Sheriff of *Suffolk*. That was an action on the case for maliciously making a double return, to deprive the Plaintiff of his seat in the House of Commons; and although the Plaintiff had Judgment in the *King's Bench*, yet on a Writ

Reported 2 Lev. 114. 1 Lutw. 89.

of Error to the Exchequer chamber, the Judgment was reversed, and the reversal affirmed in the House of Lords; and the reason why it was reversed was, because the Sheriff was considered as having acted as Judge in the making the return. That determination probably gave rise to the Statute of *William* 3. giving an action in such case against the Sheriff, for maliciously making a false or double return; and since the passing of which, the famous case of *Ashby* and *White* was decided, and the Court did say, "that if the Sheriff was not acting as "Judge the action would lie;" it was for rejecting a vote.—But then it was considered, with some difference of opinion, that the Sheriff was Ministerial and bound to execute the Writ. The next case I shall trouble you with is that of *Miller* and *Seare* in 2 *Blackstone*, 1141. It was an action of Trespass against three Commissioners of Bankruptcy, for committing the Plaintiff for not answering a question;—and the Judgment by Lord Chief Justice *De Grey*, which you will find in page 1144-5, is in my mind highly material: "But it is said, that no action "will lie against persons acting in a Judicial capacity: "let us see how far this general position is warranted by "Law. First it is argued, that the Judges in the King's "superior Courts of Justice, are not liable to answer personally for their errors in Judgment; and this not so "much for the sake of the Judges, as of the suitors themselves. Secondly, the like in Courts of general Jurisdiction, as Goal delivery &c. Thirdly, in Courts of "Special and Limited Jurisdiction having power to hear "and determine, a distinction must be made. While "acting within the line of their Authority, they are protected, as to errors in Judgment; otherwise they are "not protected;" and he gives the authorities, and then says, "thus much of Courts. The case is stronger, when "applied to single Magistrates, having or not having "Jurisdiction. In all cases where protection is given to "the Judge giving an erroneous Judgment, he must be "acting as Judge.—The protection in regard to the superior Courts, is absolute and universal; with respect "to the inferior, it is only while they act within their "Jurisdiction."

2nd, Lord Ray. 938.

This Case, my Lords, I take to be valuable, not only as recognizing the principle which indeed is established in all the other Cases, that no action will lie against a Judge of a superior Court of record, for what he does as a Judge; but as making the distinction between the Judges of the superior Courts and the Judges of the inferior Courts, who must shew not only that they acted as Judges, but that the subject matter lay within their Jurisdiction.—The Case of *Sutton* v. *Johnstone* 1 *Term rep.* 493 I refer to, not only for the Judgment of the Court on the particular matter before them; but for the general reasoning and admitted principles, which you will find in it.—It was argued at considerable length at both sides.—It was an Action on the Case brought in the Court of *Exchequer* by Mr. *Sutton* as a Captain in the Navy against Captain *Johnstone* who commanded a division of his Majesty's fleet, for maliciously and without probable cause, accusing him of disobedience of orders, and suspending him from his office as Captain, and putting him under an arrest, and bringing him to a Court Martial, and keeping him under arrest and suspension for a long time.—There was a verdict for the Plaintiff and £6,000 damages.—A Motion was made in Arrest of Judgment, and it was refused: the Judges holding that the Action was maintainable. You will find the Judgment of Baron *Eyre* in page 502. He there says, " It is objected in Arrest of Judgment, that " no Action for a malicious prosecution will lie for a subor- " dinate officer against the Commander of a Squadron, " for improper conduct while under his Command; or " as put by one of the Counsel, no Action lies for a su- " bordinate officer against his superior officer, for an act " done in the course of discipline, and under powers in- " cident to his situation." He then says, " These propo- " sitions have been supported by arguments drawn from " the analogy the Case is supposed to bear to the Case " of Judges, Jurors, the King's *Attorney-General* in " respect of his power to file informations *Ex-officio*, and " from general principles of public policy and convenience." And again he says, " In the Cases alluded to of Judges " and Jurors, it cannot apply: because the law gives " faith and credence to what they do; and therefore there " must always, in what they do, be cause for it; and

" there never can be malice in what they do." Again, " The presumption of Law is, that Judges and Jurors " do nothing causelessly and maliciously." He then proceeds and concludes, " that the commanding officer was " not in that situation, which had that particular protec- " tion." However, a Writ of Error was brought in the *Exchequer* Chamber, and the Case was there re-argued before the Chief Justices Lord *Mansfield* and Lord *Loughborough*. You will find the arguments for the Plaintiff in error in *page* 511-12. " The Plaintiff's Case rests on " the maxim, that there is no wrong without a remedy: " but this though generally is not universally true; there " are a variety of Cases in which it does not apply. The " principle of all such Cases is, that the Law would ra- " ther suffer a private mischief than a public inconve- " nience." And again in *page* 517. " It is perfectly " clear, that whatever damages may be sustained by the " wrongfull and malicious act of a Judge, or Grand, or " Petit-Juror acting as such, the party injured cannot " recover a pecuniary compensation for the wrong sus- " tained—And so in all Cases where the civil injury amounts " to a felony. Every crime includes a private injury; every " public offence involves a private wrong; but the atone- " ment in such Cases must be to the public, and the in- " dividual is without any civil redress." The Arguments for the Defendant in error are in *page* 529; and in *page* 534, you will find these words; " It has been contended, " that the Action cannot be supported on account of the " dangerous consequences to the public, and by analogy " to other Cases"—And again, " The supposed analogies " are the superior Judges of the Realm; grand Jurors " finding indictments; petty Jurors trying them; and " the *Attorney-General* prosecuting *ex-officio* for the Crown. " But the principle contended for, only protects the Judges " of the King's Courts of record. The principle is obvious " with respect to them; there is no Court equal to the trial " of the superior Judges of the Realm, for acts done in " Judicature."—The reasons of the two Chief Justices for differing with the Court of *Exchequer* are given at the close of the report; and it was held that the Action was not maintainable.—

This Case, I trust, fully recognizes the principle, which no Judge or Lawyer has doubted for the last Century: that no Action will lie against a Judge. And it is right and proper, my Lords, that such protection should be given to the Judges, who are called on by their duty to Judge between man and man, in every place, on every subject, in a variety of instances;—but if a Judge was to be assailable for every mistake in Judgment, for every wrong supposed to be committed, how invariably would the angry passions of disappointed suitors burst forth in Actions against the Judge, whom they would exclaim against as having injured them. And therefore it is, that the protection is afforded to the Judge, and the officers of the Court;—to the officers, as long as they act within the scope of their authority;—to the Judges of the inferior Courts, as long as they act not only as Judges, but within the limits of their Jurisdiction, which if they exceed, they are not only responsible to the public in an Action, but are amenable to the Justices of the Court of *King's Bench*; but the Judges of the Court of *King's Bench* who have Jurisdiction throughout the Realm, are not answerable for any errors of Judgment, for any wrong done as Judges, to the party injured—They are answerable as Judges, only to the high Court of Parliament.—There the subject will meet redress. But that Law, with which they are intrusted for the public weal, which commands their attendance on all occasions, in every district of the land, that Law will not allow them to be harrassed by any fancied injured suitor, who would drag them before some other tribunal.—Such, says the Law, would tend to the scandal and disgrace of the Judge, and the most pure of heart could not escape. This is a position of Law, which I trust cannot be disputed—It never has been, and I hope it never will; because it is founded upon principles of public policy and convenience, upon a manifestly just and imperitive necessity.

It has been said, that there is no wrong without a remedy. —It is a true and general, but not an universal proposition in the Law of *England*.—There is also a higher and a more important maxim, to which it must bend: that the Law will rather endure a private wrong, than a public

inconvenience;—and whilst the policy of the Law protects the person of the Judge, the party must submit to the inconvenience, or resort to the parliament for redress. Where injuries are done amounting to felony, no action is maintainable for them, at least until after the trial of the offender; because the public Justice of the Country requires reparation to the public in another way. So the common Law of *England* does not give reparation for injuries in the case of ships wrongfully detained at Sea.—In the case of *Le Caux* a *Eden*, *Douglas* 195. which was an action for trespass and false imprisonment against the Defendant, for a wrongful detention at Sea, it appeared that the Vessel had been wrongfully seized, and though released by the sentence of the Court of Admiralty, and restitution awarded, yet no action lay at the suit of the passengers who were detained; and the Court said, that the matter was cognizable in another place, and that they would not entertain the action. Other instances of a like kind might be put, to further illustrate the position I have laid down. So far I have argued, assuming that the act of the Chief Justice was a Judicial act—an act done by him in his capacity of Judge,—And I will ask your Lordships if I have gone too far in making that assumption, when I have called your attention particularly to the language of the plea. It states the Defendant's appointment as Chief Justice &c. "his issuing his Warrant as such Chief Justice, and "commanding thereby the arrest of the Plaintiff, for the "purpose of being brought before him [the Chief Justice] "or any of the Justices of the Court of *King's Bench*,"—. To this Plea there is no replication, but the Plaintiff has Demurred; so that thereby the facts charged in it, if legally and properly pleaded, are admitted. My learned friend Mr. *Perrin*, aware of this part of the case and the way in which it might be argued for the Defendant, suggested that this was matter of Law, not fact: namely whether the act was done as Chief Justice, or not. I admit, that what he may Lawfully do as such, is matter of Law; but whether he acted as Judge, "*colore officii*," "*virtute officii*," is matter of fact; if it be an act at all, which he might have done as Chief Justice. Such is the rule of pleading in cases of this sort. The capacity in which a man acts—the way in which he acts—and the

colour thereof, is matter of fact.—It is matter of Law, whether he acts legally,—or might so act in that capacity, and this is the only question here now on the pleading; for the Demurrer admits the fact, that he acted as Judge. They have not, as in the case of *Hamond* and *Howell*, replied and traversed the fact; although they have done so to the third plea put in by the Chief Justice.—I will call your attention to the constant course of pleading, in actions of Slander:—as for words spoken of a man in any capacity, the averment is, that the words were spoken of him as a trader, or in any other particular way,—and that is a sufficient averment, and if not traversed is admitted. In *Willes's* Reports in the case of *Eaton* and *Southby* 131. in replevin, "the Plaintiff pleads in bar to the avowry, "that the said *George Sanders*, having been possessed of "the said place, in which and so forth, as tenant at "will to the said Robert [the Defendant.]" The only question in the case was, whether the manner of stating *George Sanders* as tenant at will, was a sufficient averment of the fact; and the Court decided it was, and gave Judgment for the Plaintiff.

My Lords, for the support of this most unusual action, there is not a precedent in the books;—the novelty of which, according to Judge *Buller*, ought to be a most decisive argument against it.—He says in *Douglas* 602. "an universal silence in *Westminster Hall*, "on a subject which so frequently gives occasion for "litigation, is a strong argument to prove, that no such "Action can be sustained." This is the opinion of Mr. Justice *Buller*; but it is not his opinion alone. You will find it the opinion of Justice *Powys* in 2 Lord *Ray* 944. The Case of *Ashby* v. *White*, an Action against a Sheriff for refusing a Vote; Justice *Powys* says, "This action is "*primæ impressionis &c.*" and as an authority for his position, he cites *Littleton sect.* 108, who uses the same argument to prove, that no action lay upon the Statute of *Merton*; and therefore the opinion of Mr. Justice *Buller*, is not only founded on that learned Judge's good sense and understanding of the Law; but is fortified by one of the oldest and wisest authorities in our Law books. My Lords, let me call your attention to the nature and duties

of that high and dignified office. You will find, that it has particularly inherent in it, a power of awarding process, and compelling the appearance of any offender; and that such power is exercised by him as Judge, and in no other capacity; that he does it, not as a Justice of the peace, but as a distinct, original quality of his office. And further give me leave to say, that the assumption on the other side, that he does this act in the capacity of a Justice of the peace, is not to be found in any book of Law on the subject; and is a position, only to be found on the other side in argument. The Chief Justice has, as incident to his office, certain powers which a Justice of the peace may execute; he has certain powers, which a Justice of the peace is required to execute; but they are inherent in, and flowing out of his office as Chief Justice only, and not by virtue of any special or separate Commission—The office of Chief Justice is recognized in our oldest Law books, and happily for the country it is fully, explicitly, and clearly ascertained.—Lord *Coke* in his *4th Institute page* 70 cites *Bracton*, and speaking of the Judges of the *King's Bench*, states them to be, "*Capitales, generales, perpetui, et majores a latere regis residentes, qui omnium aliorum corrigere tenentur injurias, et errores*" and in *page* 75 he explains the meaning of those several terms. "They are called 1*st. Capitales*, in respect of their supreme Jurisdiction, 2nd. *Generales*, in respect of their general Jurisdiction throughout all *England*, 3rd. *Perpetui*, for that they ought not to be removed without just cause, 4th. *Majores a latere regis residentes*, for their honor and safety &c. &c. He also speaks of the Chief Justice of *Ireland*, as having the same authority as in *England*.

My Lords, I will here add to what Sir *Edward Coke* says, what Mr. Justice *Blackstone* states in his commentaries 3 vol. 41. "The Court of *King's Bench* is the supreme Court of Common Law in the Kingdom, consisting of a Chief and three puisne Judges, who are by their office the sovereign conservators of the Peace, and superior Coroners of the land." And so in *Lambard's Eirenarchia*, page 12 and 13, "Every Justice of

" the *King's Bench* have [closed in his office,] a credit " for the preservation of the Peace over all the realm, " and may award precepts, and take recognizance for the " peace over the realm; the other Judges within their " county," so that he seems to take a distinction between the powers of the Court of *King's Bench*, and those of the Court of *Common Pleas*, as if the latter were more limited; and he has this old expression, that they had those high powers " closed" that is enclosed in their office; for the preservation of the Peace; " closed," a forceable, strong, and most apt expression.—*Hale* has these words in his Pa. 5. 2d pleas of the Crown. " Now, concerning the Justices " of the *King's Bench*, they are, in their persons, " conservators of the Peace throughout *England*; " without any other commission; and any of them may " issue ,out their Warrants, for apprehending of a " malefactor, or for surety of the Peace in any county " in *England*; namely, to apprehend and bring him " before a Justice of Peace in the county, where he is " apprehended; and this Warrant is directed under their " hand and seal, to Sheriffs, Constables, and other " Officers. Each Judge of that Court hath a Tipstaff " attending him, being a deputy of the Marshall, for " the execution of his office in that special service; and " the Chief Justice, or any one of the other Judges of " that Court may, by the custom of that Court, *ore* " *tenus*, command the Tipstaff to apprehend any per- " son for matters of misdemeanor relating to the Court " or other misdemeanors, and bring him before him; " and such Arrest is justifiable, without any other War- " rant, and without shewing the cause." And again, in the Ist vol. of that work, page 586. " The Chief " Justice, or other Justices of the *King's Bench* may " command, *ore tenus*, the Marshall, or any of his depu- " ties, commonly called Tipstaffs, to Arrest any person; " and such command is a good justification in false impri- " sonment brought, although first, it be not in writing; " and secondly, though no cause is expressed in the com- " mand. Lord Chief Justice *Hale*, thus stating the Law, cites the case of *Throgmorton* a *Allen* 2nd *Rolle's* abridg- ment 558. title trespass C. 2. " that was an action of " trespass and false imprisonment, brought against the

" Tipstaff of the *King's Bench*. The Tipstaff justified as " servant to the Marshall, and appointed by him to " execute the commands of the Chief Justice of the *King's* " *Bench* for the time being; and that the Chief Justice " commanded him to take the Plaintiff, and him safely " keep &c. to answer &c. by force of which Warrant " he took the Plaintiff; and that was a good justification, " though the Warrant was by parole." And your Lordships see, that it states a Warrant from the Chief Justice to be a Justification in trespass, without stating there was any information.

It has been argued on the other side, that this case is not conclusive for the Chief Justice; for that there, the Tipstaff having arrested a man by the command of the Judge, was obliged to obey, although the command was not justifiable in itself. But admitting for a moment that this distinction may be taken, and that there may be cases where the officer is justified and yet the person who gave the command could not be defended; and admitting that even such a case is maintainable by the case in *Willes's* reports mentioned by Mr. *Perrin*, though contrary to the celebrated argument of *Justice Powell*, in the case of *Gwynne*, and *Poole*, *Lut.* 1593; yet, my Lords, no such distinction is to be found, with respect to a Judge of the *King's Bench*. It refers, (if it be Law) to cases of Judges of inferior jurisdiction. The case of *Throgmorton* a *Allen*, in terms, makes no such distinction. Lord *Hale* lays down the Law broadly, as I have stated it; and agreeable to his high authority I defend the action on this plea, not thinking it necessary to shew, that the command of the Lord Chief Justice is right; not thinking it necessary to examine into his commands, as to what he does as a Judge; because I say, this Court cannot enquire into it; but standing on the broad principle, that what he has done, has been done by him as a Judge, in a matter wherein he has Jurisdiction; that he can issue his Warrants, as such; that the issuing of it is incident to his office; and that as such, he has acted in his high and exalted character of Lord Chief Justice.—But the Case of *Throgmorton* and *Allen* shews, what indeed

a little consideration of the case itself would evince, that the Case mentioned of *Groenvelt* v. *Burwell* in 1 *Salk.* 396, and in Lord *Raymond* 230, and relied on by Mr. *Perrin*, does not touch or affect this question.—That was a Case of trespass against the censors of the College of Physicians. The determination was with the Defendant. It was cited for some expressions in it. The words of the Court relied on are these: " If a Constable commit a " man for a breach of the peace, when there was no " breach of the peace" if a Constable, observe, that is, an inferior officer, " that may be traversed for he " is not a Judge;" and then the words next used are as if to meet any objection to the character of the act; and it says, " nor does he act by Judicial authority, tho' " he has a power to commit; for he does not commit for " punishment, but for safe custody." And from these expressions Mr. *Perrin* would argue, that a commitment by a Judge for safe custody was a commitment, the circumstances of which were inquirable into, contrary to the positions to be found in the several books, and to the express determination in *Throgmorton* and *Allen*. But in fact the case answers itself, for the special reason given is, " For he is not a Judge, nor does he act by Judicial au- " thority." Now as to the argument, that a Justice of the peace could not issue a Warrant 'till indictment found; although something of that is to be found in Lord *Coke*; in the first place, it applies only to Justices of the peace; and next, it is a position denied by all the late authorities. Lord *Hale* in his first vol. *page* 579 says, " Justices of Peace may also issue their Warrants with- " in the cognizance of the sessions of the Peace, and " bind them over to appear at the sessions; and this, tho' " the offender be not yet indicted." So also in 2 *Hawk. chap.* 13 *sec.* 11. " For in as much as it seems to be " constant and allowed practice of late to make out Wa- " rants on the suspicion of felony, before any indictment " hath been found against the person suspected." And *Dalton* 117 is to the same effect. The same is laid down in 6 *Mod.* in an anonymous case thus: " formerly indeed " none could be taken up for a misdemeanor, until in- " dictment found; but now the practice over all *England* is " otherwise;" and so in 4 *Blackstone* 287. I do not think

this so necessary to the argument, but I mention it merely as it has been thrown out; for if the Chief Justice had Jurisdiction of the matter, his exercising his Judgment erroneously would come to the same thing; the party could not have an action against him for such error in Judgment.

So far, I think, I have gone to shew, that the Chief Justice has power to commit; and that he cannot commit in any other capacity than as Judge, is manifest.—He has no separate commission—His authority to commit is derived from his patent—His powers are closed in his office—He derives his authority from that office, and from nothing else. But it is objected, that it is an act done out of Court; and that no Judge, for any thing done off the Judicial seat, has that protection which the Law gives to the other acts of the Judge; that the moment he leaves the Court, he is divested of his character as Judge; and that every thing done out of Court, is done, either as a Common Magistrate, or an ordinary individual. But is there not the same reason, why he should be protected in the one Case, as the other? If in the one Case he acts at the commencement, in the other he acts during the progress, or at the determination of a Suit: for is not the award of process, to bring in a party to stand his trial at the prosecution of the Crown, the commencement of the Suit? And as such, one of those acts, which a Judge as such is impowered to do. Is it not completely analogous to proceedings in civil Cases? To the arresting or holding to bail in a Case between party and party; and the holding to bail in a civil Suit is, I believe, a Judicial act. In ordinary Cases of contracts the party is held to bail by the common order of the Court, without any express interference of the Judge; but in the Case of torts, where it is of such a nature, that in the opinion of the Judge the person guilty ought to give security for his appearance, it is the invariable course of the Courts to make an order to that effect.—The Case of *fiats* is familiar to your Lordships. I am not an advocate for every exercise of that power—It may be abused; and there have been loud complaints that it was so. But when *fiats* at one time in this country were carried to a deplorable excess, yet was it ever thought of,

to bring an action against the Judge for issuing those *fiats*; when such a measure would have been resorted to, if it was maintainable? Did the learned and able Gentlemen, who brought forward the motion on the subject in the *House of Commons*, think an action was maintainable against the Chief Justice? No, my Lords, they were satisfied, that the awarding of a *fiat* was the act of a Judge as such; and what is a *fiat*, but a process out of Court by a single Judge, to bring the party into Court? The words are "upon reading the affidavit of *A. B.* let a Writ issue"—If an action was maintainable in such Cases, every Judge should keep the affidavits on which he acts, for his own Justification—To keep them as his defence, and justify like a common Magistrate. Are you to have your filazers, to keep those affidavits filed as your security against action? Is that ever done? Those affidavits are given to the party—Are gone—Are lost—And then so would the Judge's defence? If you were answerable in an action, for making that order, you are a principal in the trespass! You must look for your defence in the affidavit, probably lost; you must submit to another Court; and then, you, the Judge of a supreme Court, acting as Judge, are made responsible to the Judge of another Court of equal, possibly of inferior Jurisdiction! And is that Case different from the awarding of process in this? The Warrant of the Chief Justice recites, that informations had been lodged; and then directs the process to issue, to bring the offender to Justice—It is no matter, whether the Plaintiff be guilty or not—I care not whether he has committed a crime or not—The Chief Justice thought that an accusation of a crime, for which the party ought to be arrested, was made. He has decided so; and you must take his Warrant as decisive of the fact, that he had ground whereon to act, in the same manner as your Lordships would judge upon the order in the case of a Fiat. Am I going too far in saying, that such a decision of a Judge in a civil suit, is a judicial act? Is it necessary to state authorities for that? It is so laid down in 1 *Mod.* page 2. "Moved in Battery, that the party might be held to "special bail, but denied. *Twisden*, Justice, follow the "course of the Court." So also in *Siderfin* 276. "Spe-"cial bail ordered in a case of great Battery and Maihem."

So also in *Comberback* 57. *Pelton* and *Dadley*, " because " the Battery appeared to be foul, it was moved for spe- " cial bail, and granted." 1. *Blac. Smith* a *Frasier* " Motion to lesson special bail, ordered by Mr. Justice " *Foster* out of Court: motion refused."

I mention those cases merely to satisfy your Lordships, that the awarding of bail in civil cases, and the orders of a Judge for that purpose in chamber, are judicial acts; and acknowledged, at least since *Wilkes's* case, to be the Law of the land; and although, my Lords, I admit, that in cases of slander abuses have been committed, and special bail has been insisted upon, beyond what reasonable men would award; yet the exercise of the power, though improperly abused, has been always considered a judicial act; and therefore no action has ever been brought, for even the abuse of it, because it was done as Judge; but the party was complained of before that tribunal, competent to correct the errors and mistakes, or the wilful default of the Judge, and to remunerate the subject, judging upon the facts and circumstances of the case. Then, my Lords, we say, that the issuing of this process, was the same as the awarding that. Is it not so? In a civil case, the Judge directs the Officer to issue the Writ. The Order directing the Writ is the Officer's justification. In criminal cases, for the securing the offenders, lest the malefactor should escape, the Judge awards and makes out the Process, and the officer executes it. Whatever difference there may be in the mode and form, the substance is the same. The Warrant is the criminal Process, as the Writ is the civil. It is the Process of the Court. In the *King* against *White*, *reports temp. Hardwick* 87. a motion was made " for an Attachment against the " Defendants, Constables *of Scarborough*, for not obeying " the Chief Justice's Warrant, directed to all Constables " throughout *England*, to Arrest a man for Felony;" and the Attachment was awarded: for in the language of the Court, " the Judges of this Court have power to " grant Warrants, to be executed by all Constables " throughout *England*. And disobedience to a Judge's " Warrant is a contempt of the Court; and such a con- " tempt as the Court will take notice of, by way of

"Attachment." But, my Lords, will the Court attach for a contempt of an Act, not a judicial one? Will they attach, except for an abuse of their own authority? Will they, for the abuse of that of a Justice of the Peace, or of an inferior Court? 1 *Strange* 567. *Rex* a *Burchell*, they will not. Does not this case go the full length of establishing every thing I have said? Is it not a decision of the Court on the very matter? Deciding, that the Warrant of the Chief Justice is the process of the Court; that the person sueing it out must be protected by the Court; and that disobedience to it, is a contempt of the Court. But these are not the only instances, in which acts done by a Judge, out of Court, are recognised as judicial acts: for it is a distinction between acts done in Court, and those done out of Court, that the other side would wish to establish; a distinction, I contend, without a difference, not founded in reason or authority.—The reason which protects the Judge on the Bench, protects him in every act which he is competent to do as Judge. The question is, is it an act which may be done as Judge; and has it been done in that capacity. The taking recognizances is a judicial act, out of Court—*Noy.* 157. It is said however, that may be done by the ordinary Justice of the Peace; but he does many things as Judge, independently of Statutes, for which no Action lies against him: as if he record a fine upon his view, where there is no force—there no Action lies. 12. *Coke* 23. 1. *Salkeld* 477. So far as he has power to bail on an Indictment, he does it as annexed to his judicial authority; but when he has power to bail by Statute, and not as Judge, the very Statute regulates his power and authority; but none of those Statutes apply to the Judges of the Court of *King's Bench*: as you will find upon looking into the reasonings of *Hawkins* on these subjects, 2 vol. 147-8. It does not touch the office of Chief Justice.

Again, my Lords, a most important duty, not only of the Judges of the Court of *King's Bench*, but of every Judge in the hall, to be executed out of Court, remains; a branch of his duty, most necessarily affecting the liberty, and security of the subject; a part of his duty nevertheless, in which he is as much protected from action, as in any

other branch of his duty on the Bench—I allude to the great Writ of liberty—The Writ of *Habeas Corpus*.—That power and Authority both at Common Law, and under the Statute—That power recognised and entrusted to them, not as Justices of the Peace, not as Judges of inferior Courts; but as Judges of the King's Superior Courts—knowing no equal in the land—having no person to Judge them—no person to controul them—no person or Court, to which they are responsible, save to the King in Parliament. You are aware, my Lords, that the writ of *Habeas Corpus* is a Writ of Common Law, and that the mode of granting it, and the time and manner are regulated by the Statute of *George III.* in this Country, and of *Charles II.* in *England*. But this Statute of our protection and security, does not diminish or impair the inviolability or the integrity of the Judge. The Statute provides various instances, in which the Writ is to be granted in Term, and out of Term; and only in one single instance, namely the denying the Writ in the vacation, is the Judge made liable to an action—not liable at all, except by virtue of the Statute—not liable otherwise for the grossest abuse of his duty—not liable for refusing it in the worst of Cases, except by the aid of this Statute. And what does *Hawkins* say in 2 vol. 147. Chap. 15. Section 24? "It is observable, that this Statute makes "the Judges liable to an action at the Suit of the party "aggrieved in one case only, which is, the refusing to "award a *Habeas Corpus* in vacation time;—and seems "to leave it to their discretion in all other cases, to pursue its directions in the same manner, as they ought to "execute all other Laws, without making them subject to "the action of the party, or to any other express penalty "or forfeiture: and this is most agreeable to the general "reason of the Law, which regularly will not suffer a "Judge to be liable to an action for what he does as Judge." My Lords, is the proposition confined to acts done in Court? Is the position narrowed to the short time your Lordships remain on the judicial Bench? When he speaks of an act out of Court, construe his words according to their natural signification in the text, and it must refer to every act of the Judge protecting him off the Bench.

And now, my Lords, I refer you to a most valuable book—The Cases collected by my Lord Chief Justice *Wilmot*, a Judge whose authority no lawyer has ever disputed, whose Judgments are marked with precision, integrity, and a due regard as well for the rights of the Crown, as the liberty of the subject. My Lords, in the year 1758, loud complaints were made of the abuse of the execution of the *Habeas Corpus* act, and a Bill was brought into Parliament to new modify it. The Lords ordered the Judges to attend; and certain questions were put to them, their deliberate answers to which were given in and recorded. I have taken the answers to one or two of them. The second question was, "whether in Cases "not within the said act such Writs of *Habeas Corpus*, "by the Law as it now stands, may issue in the vacation "by *fiat* from a Judge of the Court of *King's Bench*, re-"turnable before himself." The fourth question was, "Whether at the common Law, and before the Statute "of *Habeas Corpus* in the 31st *of King Charles 2nd*, "any, and which of the Judges could regularly issue "a Writ of *Habeas Corpus ad subjiciendum* in time of "vacation, in any and in what Cases particularly." The fifth question was "whether the Judges had a discretion, "or were bound to do so." My Lords the material question is the seventh, "Whether if a Judge, before the "Statute should have refused to grant the said Writ, "upon the demand of any person under any restraint, "the subject had any remedy at Law or otherwise against "the Judge for such refusal." On those questions deliberate opinions were given. The answers you will find beginning at *page* 81. Thus to the second *quære*, "I am "of opinion that in Cases not within the act of the 31st "*of Charles 2nd* Writs of *Habeas Corpus ad subjiciendum*, "by the Law as it now stands, may issue in the vacation, "by *fiat* from a Judge of the Court of *King's Bench*, re-"turnable before himself." He says that this usage was of great antiquity, and he goes at large into it. To the 4th and 5th questions, he says, "I think the Chief Justice of "the Court of *King's Bench* and the other Judges of that "Court did issue them in vacation." To the 7th question *page* 104, he answers, "I think that the subject had no "remedy at Law by action or otherwise, against the

" Judge for such refusal. The denying a Writ stands " upon the same ground, as any other breach of duty." My Lords, I ask is the refusal in this Case an act done in Court? Is this an act requiring the sanction of the Judicial situation? Yes—and his character as Judge protects him—that character under which he is bound to decide on the fitness or unfitness of the Case for issuing the Writ. Again, my Lords, let me remind you of what occurs on your circuits. On your entering a County the ordinary functions of the Magistrates are suspended; you make orders to arrest, and to take informations out of Court, in your chamber. Are you aware, that you become principals in trespass? And are you to keep the Warrant of the Magistrate, or to get from him as your justification, the affidavit which it was his duty to lodge with the Clerk of the Crown, but which may probably be lost long before a trial; and then the Judge is condemned, because he has not the affidavit on which alone his justification depends. Is such a position to be tolerated? Would your office be tolerable? Could it be exercised as it is, at all times and in all places? You have no regular officer attending you to keep the affidavits, to file them, and preserve them from injury or interlineation, nor are you entitled to the custody of them. A single interlineation sets aside your defence, and you become answerable in damages at the suit of an angry party, who supposes himself improperly arrested.—My Lords, did I go too far when I said that I would satisfy you, that the act here complained of was done by the Defendant as Judge; that it was so conceded by the pleadings; and that any act done as Judge, either in, or out of Court, is within the same protection of the law?

My Lords, I only lament that I have been forced to argue the Case in this way—I lament that I do not defend my learned and respected Client upon the informations upon which he acted—But my Lords, it was not thought right by those who had the management of and to whom was entrusted his defence, that an attribute of his high office should be surrendered to this unusual, this unprecedented attack upon it—to which there can be found no

parallel. I lament that such was their determination, that they felt they could not in justice, not to their Client but to his high office which they felt themselves bound to protect, that they could not go into the true merits of this transaction. They have done so upon consultation, for public purposes. But it is said, that a Justice of the peace must plead the matter of justification specially; that he must setforth the information, and shew the cause of action to be within his Jurisdiction. I admit he must; but there are wide and material distinctions between him and the superior Judges. He is a Judge only in certain Cases and then only a Judge of an inferior Court, responsible to the Judges of the *King's Bench*—He is not entrusted with general authority to execute justice throughout the country—He has a limitted jurisdiction circumscribed not only in space, but in power and authority—He may arrest in certain Cases, and his power is regulated by Statute. He is a Judge in certain Cases; but only in certain Cases—He has not jurisdiction of certain crimes—for instance, he cannot Judge Cases of treason—even of misdemeanor, except with the assistance of another—He cannot sit judicially alone—He has the custody of the informations—He has them with him; and may protect himself thereby—He and they are local; and not going into every part of the realm—But a Judge of a superior Court has a general authority, extending over the whole realm—Having in every county a Jurisdiction of all offences, from the lowest misdemeanor to the highest crime - He has not the custody of the informations—He is bound to Judge in every manner, and in every place—And I say, my Lords, in a case such as the present, which probably might require a trial at the bar of the Court, it was fit and proper that the Chief Justice of that Court should award the process, by which the offender is to be brought to the bar,—If the occasion was thought to be of such public interest as to require greater solemnity of trial, by its being heard at the bar of the Court of *King's Bench*, it was fit and right, that the Judge who was ultimately to decide should have the power to bring in the offender, and should exercise it.

Therefore my Lords, considering every thing which has been urged both upon authority and principle, I trust

that this unusual action, condemned by the silence of ages, now for the first time brought forward, will be consigned to that oblivion in which it ought to have slept; and that in future, no action of this kind tending to the subversion of Justice and the authority of our courts, may be brought either for experiment or malice—and that our Judges may rest satisfied and contented, that their high office gives them an honourable protection; and that they are answerable only to that high tribunal, which alone has power to correct the errors of their judgments, or the corruption of their hearts.

Friday, Nov. 13. For the Plaintiff.

MR. O'CONNELL. My Lords, I am highly sensible of the indulgence I have received from the Court on the present occasion*; in recompence I shall be as brief as possible, while I endeavour, in discharging the only duty that now remains to me, to reply to the arguments of the gentlemen on the opposite side. And, my Lords, in discharging this duty, I shall avoid imitating the example set me on the last day by one of these gentlemen, and by the other on a former day, in travelling out of the direct course which the question before the Court prescribes. I shall leave unnoticed what the Counsel has justly called the "whimsicality" of introducing politics upon an occasion like the present, and confine myself to the mere question of law. But though Mr. *Pennefather* in describing the nature of the present action, indulged his fancy in quoting one of the Law books, to call it "a bold attempt on the Government of the Country," yet in explaining what I conceive to be the Law of the land on the case, I will not (even though I exclude political reflections) for a moment doubt, but that I should speak my sentiments, and those of my colleagues upon it, with the most unrestrained, and unembarrassed freedom.

The question involves great constitutional principles—it does not depend upon mere technical rules, or technical reasonings; but must be decided upon the consideration of the nature and extent of personal liberty in this Country, and the sense Judges have of the rights of the subject, and

* On the last day the Court postponed the argument on account of Mr. *O'Connell's* indisposition.

the redress they are entitled to avail themselves of, for the injuries they suffer. Little can be obtained from modern cases—little from the loose and idle pamphlets of *English* Reports—the "*folia Sybilla*" of the Law, partaking of the error rather than of the poetry of inspiration. The simple question is: whether there be a class of Magistrates in this Country, entitled to issue their Warrants without any information upon oath, and without any crime having been actually committed, and entitled upon such warrants to imprison any description of the King's subjects without remuneration. If the Court decide with the Defendant, they establish this monstrous proposition—an Imprisonment without legal warrant, without the commission by the party of a crime, and without any redress or remuneration to the Party suffering.

See what the action is. It is an action brought against the Defendant for false imprisonment; and his justification is, that he is Chief Justice of the *King's-Bench*. It is an action of Trespass. This is the proper form of an action brought against a Magistrate who issues a warrant illegally. The case of *Morgan* v. *Hughes*, in 2 Term Reports, 225, proves that it is the only form of action suited to such a case. That was an action of Trespass on the case, the Defendant being accused of having issued his warrant, and maliciously arrested the Plaintiff. There was a Demurrer to the Declaration; and Judgment was given for the Demurrer, because the action should have been brought in Trespass for false imprisonment. The action is therefore right in point of form.

What is the nature of the present defence? The mere assertion that the learned Defendant is Chief Justice of the Court of *King's-Bench*, and the assertion of the mode he adopted in imprisoning the Plaintiff. The Plea does not say, that he dispatched his menial servant with such commands as he pleased to give; but it does say, that he granted his warrant with such recitals as his imagination suggested. This is the real language of the plea.—It cannot be aided by any intendment.—No presumption can be made in its favor; on the contrary, the first principles of pleading require, that it should be taken most strictly against the Defendant. This is the rule laid down by

Lord *Coke*; (*Co. Lit.* 303) and to shew that this general rule of pleading most strictly applies to justification in Trespass, I beg to refer your Lordships to *Comyns* Digest, *E.* 17.—an authority which shews, that he who seeks to justify a Trespass, must in his pleading make a compleat defence. Nothing therefore, can be intended beyond these allegations of the plea, that the Defendant was a Magistrate and arrested the Plaintiff by his warrant. The plea contains nothing more. To constitute a justification the Court should, but it cannot supply those allegations: 1st, that a crime was committed: 2d, that the Plaintiff was one of the persons concerned in that crime: 3d, that the Defendant knew or suspected that the Plaintiff was so concerned. These are clearly material and traversable allegations, upon which issue might be taken, and the fact tried by a Jury; but no issue tried upon this plea can bring any of these acts into controversy. If issue in fact was taken on this plea, upon the trial it would not be necessary for the Defendant to prove any of them; so that it is clear that if the Demurrer be over-ruled, the Court will establish a right in a class of Magistrates or in some of them, to arrest without *knowledge*, without *suspicion*, without *a crime*, without *a criminal*. The class of Magistrates to which I allude, is composed of the Lord Chancellor, the Lord Treasurer, the Lord High Steward, the Lord Marshall, the Lord High Constable, the four Judges of the *King's-Bench*, and the Master of the Rolls—for all of them have the same authority as the Chief Justice, as appears by 1st *Blackstone*, 350. This is therefore, a question of great public importance. It is of importance to ascertain if imprisonment may be arbitrary and capricious, without relief or remedy.

I now proceed to shew, 1st, That the plea does not state any matter sufficient to justify the imprisonment of the Plaintiff; or, in other words, that the Trespass is manifestly a false imprisonment, notwithstanding any thing alledged in the plea: 2d, That there is nothing stated in the plea sufficient to bar the action for false imprisonment against the Defendant. If I clearly establish the first, I shall go far to induce the Court to decide the second proposition in my favour.

Now as to the first, it seems unnecessary to go beyond the unrepealed clause of the great Charter; namely, that no freeman shall be imprisoned, unless by the Judgment of his peers, or by the law of the land. There I may rest my client's case, and call for the Judgment of his Peers, or that law of the land which dragged him from his family, without as much as the ordinary courtesy of summons or notice—which associated with him through the streets of this city, as if he were a felon, the thief-takers of the police. Where is the judgment that condemned him to sustain this inconvenience and contumely—there is none, my Lords,—it is not pretended that there is any, and for law we are presented with this warrant—a warrant not only presuming, but creating all the facts; and fortified by nothing, but its own allegations, commanding the arrest of the Plaintiff, at the mere will and pleasure of the person who issued it—a warrant, distinguishing it is true, between meetings for the purpose, and those held under pretence of petitioning parliament, but declaring guilt in either case—a warrant, admitted by this plea to have been grounded upon no charge, nor sanctioned by any swearing.

But can it be insisted, that this Warrant answers the description of the law of the land? Can the Chief Justice make Law? Can he promulgate decrees, or enact Statutes? It seems to me to be a monstrous proposition, to call this Warrant the Law of the land; and indeed it would be still more absurd, to call any man a freeman, who was subject to such a Law. He would be the abject Slave of caprice.—I know my Lords, that a Statute the 37th of *Edward* the III. chap. I. has explained the words *Legem terræ*, to mean due Process of Law. But is this due Process of Law?—It is a Warrant issued simply and solely at the will and pleasure of the Defendant—It has no other foundation than the maxim of despotism—*Sic volo, sic Jubeo, stat pro ratione voluntas.*

Here I wish to be distinctly understood, that I for the present concede in Argument, that which in point of Law I could not admit, save for the sake of Argument, namely, that the supposed offence charged upon my Client is

one for which any Subject is liable to Arrest before Indictment—I admit it in Argument—In fact and in Law, I deny that it is so.—

It is not a felony or a breach of the Peace; and therefore I am convinced, an Arrest before Indictment was not justifiable in this Case; but for the purpose of present Argument I concede, that it would be justifiable upon due Process, "and if this Warrant be *due Process* "*of Law*," is the present question. I have already shewn that this Warrant is not grounded upon any Evidence, or a suspicion, either of an existing crime, or of the Plaintiff's being a criminal; but to sanction and justify an Arrest, these are necessary ingredients in a lawful Warrant.—For no Arrest can be made before Indictment found, unless there be either, first a direct charge upon Oath, stating the existence of a crime, and that the party actually is, or is suspected to be a criminal; or secondly, strong and rational suspicion declared upon Oath, of the crime and criminal. This is the utmost extent of the legal doctrine of Arrests.—If suspicion will justify an Arrest, even when confirmed by the Oath of the party accusing, has been much doubted—But I am ready to concede this Law in its strongest construction against my Client; and taking the Law then most strongly against him, it will appear from all the books, that these are the only legal grounds to justify the granting of a Warrant to Arrest.—I refer you to 4 *Blackstone* 289, 2 *Hale* 108, 110, 2 *Hawkins* 135, 6, 2 *Hale* pa 110, insists upon *the necessity* of examining the parties requiring the Warrant, upon Oath, as to the fact of the existence of the crime; and the Criminal; and *Blackstone* says, that without such Oath, "no Warrant should be "granted;" and the same Law is laid down by Serjeant *Hawkins*.

By consulting these Authorities, My Lords, you will find, that I am borne out in asserting, that this is the very utmost extent of the Law; for more ancient Writers, as Lord *Coke* (2nd *Institute* 51—2) assert, that before Indictment or Presentment no man could be arrested;

and all that *Hale*, *Hawkins*, and *Blackstone* contended for, is, that Lord *Coke* is mistaken in going to that length, for that if *there be a charge upon Oath, a Warrant to Arrest may be granted before Indictment.*

This point namely, that a charge upon Oath can alone sanction an Arrest before Indictment, is the utmost they contend for; and *Hawkins* concludes his Observations upon the subject: in these Words, "Yet (in as much) as "Justices of the Peace claim this power (that of arrest-"ing before Indictment) rather by connivance, than any "express Warrant of Law, and since the undue execution "of it may prove so highly prejudicial to the reputation, "as well as the Liberty of the party, a Justice cannot "well be too tender of his Proceedings of this kind; and "seems to be punishable, not only at the Suit of the King, "but also of the party grieved; if he grant any such War-"rant groundlessly and maliciously, without such a proba-"ble cause, as might induce a candid, or impartial man to "suspect the party to be guilty," 2 *Hawkins* 135, 6.—We have thus got to the extreme of the Law, when we arrive at Arrests by Warrants granted because of a Charge established on Oath; and an extreme which has been resorted to, not because it has the sanction of any express Law, but by reason of its necessity, to prevent the escape of Felons before they could be indicted—an extreme which is now admitted because of a connivance at the long used practise of issuing such Warrants.—It is not indeed, in Cases where it applies now disputed, because in addition to the authority on which it rests, in the direct Opinion of "the Sages of the Law," it has been recognized in certain Cases of felony by some Acts of Parliament, which direct the manner in some instances of giving Bail after an Arrest on such Warrants; but there is no where to be found, any Case, or any allegation of any Law Writer carrying the power to Arrest further: for I need not detain the Court by any comment on the passage in *Hale*, which refers to *Throgmorton* and *Allen*, 2 *Roll. Ab.* 558.

Mr. *Perrin* has, with the ability and learning he discovers on every occasion, shewn you, that *Hale* must be understood as meaning, that the Warrant of the Justice is a

justification to the constable who executed it, not that the Justice could protect himself by his own allegation, or justify his own act by an assertion of the act itself. This distinction is familiar to your Lordships; and although Mr. *Foster* relied on the passage, to sustain the Defence of the Justice, who issued the warrant, yet Mr. *Pennefather* felt himself bound to admit, that the passage is merely applicable to the constable, and the case referred to of *Throgmorton* and *Allen*, is accordingly the case of a justification by a constable. There is therefore I repeat it, not a case, nor even a solitary *dictum*—and if there had been any, the research of the Counsel for the Defendant would have discovered it,—there is not, I confidently repeat, a single assertion in any law book, that a warrant may be legally issued without a charge upon oath. It follows therefore, of obvious and inevitable necessity, that this warrant was not legally issued,—it was not then "due "process of law."—My Client has been illegally, and against the provisions of the Great Charter deprived of his liberty.—The Defendant is guilty of false imprisonment.

This brings me to the second point, for it is alleged, that though the arrest was unjustifiable,—although the Defendant be clearly guilty of a Trespass and false Imprisonment; yet he is not responsible in an action for Damages. In other words, it is asserted, that the Defendant has a personal privilege, conferred on him by his office, of committing Trespasses with impunity. In short, that that though he is not infallible, still he is inviolable; but I trust, I shall be able to satisfy the Court of my second Proposition, namely, "that the matter stated in the Defendant's plea is not sufficient to bar the Action against the Defendant for this false imprisonment." The Plea contains nothing, but the fact which appears on the face of the Declaration, viz. "That the Defendant is Chief Justice of the *King's Bench*, with all the Authorities and Rights belonging to that Office; and that he as such, arrested the Plaintiff by means of a Warrant." Upon this allegation, the Counsel for the Defendant contend, that no Action lies; and conceding, that a Trespass has been committed, they say, that this is one of the instances

in the law, where there is an injury without means of compensation, *damnum absque injuria*, because the Defendant being a Judge of a superior Court, no action will lie against him. This assertion of the Defendant's Counsel is grounded on a mere mistake, or rather, a designed confounding of matters perfectly distinguished. It is, my Lords, readily admitted, that no action lies against any Judge for any *judicial* act whatsoever; but we insist, that it does lie against every Judge for *ministerial* acts. This distinction was taken by Mr. *Perrin*, and sustained with his usual force and ingenuity. It was admitted by Mr. *Foster*, and though not expressly admitted, it was, as I shall shew, distinctly recognized by Mr. *Pennefather*, who however, has announced a new proposition: namely, that no action lies for any act of a Judge of the superior Courts; adding however, any act done as a Judge. Now, if by acts done as a Judge, he means judicial acts, this is conceded.—If he includes ministerial acts, and that the Judges of the superior Courts are in no wise responsible in actions, although for the same acts, and within their jurisdiction inferior Judges would be responsible, this is not only denied, but the charge of "a bold attempt" to subvert a principle recognized in those very cases, which he has himself cited, is retorted and justly retorted on the learned Gentleman; for in *Hamond* v. *Howell*, 2 *Mod.* 218, cited by Mr. *Pennefather*, the Court expressly says, "although they (the Judges) were mistaken, yet they "acted judicially, and *for that reason* no action will lie "against the Defendant." For what reason? Not because the Defendant was Judge of any particular Court, but because he acted judicially; and in *Floyd* v. *Barker*, 12 *Coke*, 23, this distinction is expressly taken, "a Judge "or Justice of the Peace cannot be charged for conspiracy "for that which he did openly in Court, for the causes "and reasons aforesaid."

The two next Cases cited by the learned Gentlemen, not only confirmed the distinction we rely on, but illustrate its application in practice. These cases are *Barnardiston* v. *Soame*, 2 *Lu.* 114, and *Ashby* v. *White*, 2 Lord *Raymond*, 938. In the first of the cases it was held, that no action would lie for falsely and maliciously making a

double return to Parliament; why? Because the Judges were of opinion, that the Sheriff acted in that respect judicially. But in *Ashby* and *White* it was held, that for rejecting the vote of a person qualified to vote at an Election, an action would lie against the Sheriff; why? Because it was held, that the Sheriff acted in that respect Ministerially; and this distinction is further recognized and acted on in the next case cited by Mr. *Pennefather*, of *Miller* against *Seare* (2 *Blackstone* 1141,) where an action was held to lie against the Commissioners of Bankruptcy, for improperly committing a man for not answering satisfactorily,—it was held to lie, because their office was considered Executory and Ministerial, and not Judicial. Let me add to these Authorities the case cited by Mr. *Perrin*, and commented on by the Gentlemen on the other side, of *Grœwelt* v. *Burwell*, (in *Salk* 396, *Lord Raymond* 467, and *Comyns* 77.) The Court will find the judgment of Lord *Holt* given very distinctly in *Comyns*, and it expressly states, that no action will lie against any Judge, for what he does Judicially, and of Record; but if a Justice of the peace issue a Warrant, and commit a party without cause, he may be punished; because the act is only Ministerial, and the commitment only intended for process, and not for punishment; and he cites from 12 *Coke*, *Nudigate's* case—*Nudigate* was a Justice of the peace; and though he recorded a circumstance falsely, yet as he acted as a Judge, that is Judicially, no action would lie.

Now compare the cases: if *Nudigate* had issued a groundless Warrant for any act of violence, an action would have lain against him: because the act was Ministerial; but when he acted judicially and upon record, no such action could be maintained. Thus, my Lords, all the cases establish our distinction between Judicial and Ministerial acts, as well the cases relied on at the opposite side, as these cited by Mr. *Perrin*. But where is the distinction stated by Mr. *Pennefather* to be found? I have been unable to find it in any of the cases; and if you examine the authorities from which he has endeavoured to infer such a distinction, I think you will join me in considering, that his inferences are unfounded, and his positions untenable. Mr. *Pennefather* is the first person who has ever announced the proposition.

Having, I trust, established that which is indeed a familiar distinction to your Lordships—between Judicial and Ministerial acts—I shall proceed to shew you, that the issuing of the Warrant by the Chief Justice was a Ministerial, and not a Judicial act. I admit, that the Judges of the *King's-Bench* are Coroners, and Conservators of the peace throughout *Ireland*; and it is in this capacity of Conservator of the peace, that the present Warrant was issued, or indeed could have been issued.—None of your Lordships, notwithstanding the dignity and extent of your judicial authority, could issue such a Warrant: because none of you is a Conservator of the peace, throughout the different counties. But the Conservator of the peace was and is, merely a Ministerial Officer. In *Lambard's Eirenarchia* 6. 12 and 14, and in *Blackstone's Commentaries* 1st. vol. 1st, 350, the nature of the office is detailed. The Conservator of the peace had no judicial functions.—His power consisted in suppressing riots, and taking securities for the peace, and in apprehending felons and other inferior malefactors.—This would appear to be the full extent of the common law authority of Conservators of the Peace.—This is the legal character of the Conservator. The court is of course fully aware, that the constitution of Justice of the Peace is evidently different. The Conservator of the Peace held his office, either by virtue of the tenure of some other office, or of Lands, or by the free Election of the County. The right of Election was taken away; and the Crown usurped the power of appointing Conservators, at a disastrous period of Murder and Treason.—The last year of *Edward II.* witnessed this change—and the first year of *Edward III.* saw the power of assigning Conservators of the peace vested in the crown.—The Statute is 1st, *Edward III.* C. 16. Yet, though appointed by the Crown, the office and duty were not changed; but by the 34th, of *Edward III.* Chap. 1, the Conservators first got a Judicial character.—They were empowered to try offences, and obtained the name of Justice, 1 *Blackstone* 350. The Justices of the peace are Judges of a Court of Record.—The Conservators of the peace are not so.—The Conservators never had, nor has he, as such, any judicial authority.—This power of Conservator of the Peace, the Chief Justice of the *King's*

Bench holds in common with the *Chancellor*, the *Master of the Rolls*, and the other persons whom I have named; and if this be a good justification for a Chief Justice, it would be equally so for the *Master of the Rolls*: for he has vested in him the same authority, in his ministerial capacity.

I have thus shewn you, that the office of Conservator of the Peace, was a new ministerial office; next I proceed to prove, that the issuing of the Warrant was in itself, a ministerial act. For this I have the express authority of Lord *Holt*: his words are "an action will lie for improperly issuing a Warrant, because the act is only Ministerial, and intended for process, not punishment;" and I have the equally explicit authority of all the cases from *Windham* v. *Clere* Cro Eli. 130, to *Morgan* v. *Hughes* 2 Term Reports 225; and those cases which occur every day, in which actions are maintained against Justices of the peace, for issuing Warrants without legal grounds; although those Justices are Judges of the very Courts, in which the offences specified in those Warrants are triable; although they have jurisdiction over the offence, and the offender; and although, for their judicial acts in that very matter, no action would lie. The distinction is indeed familiar to the practice of every day—Actions are constantly maintained against Justices for issuing of Warrants, where it is well known, that for misconduct at the Court of the officers specified in those Warrants, no action would lie. Here then is a Ministerial act done by a Ministerial officer, for which, whatever may be the number and value of his other high dignities, he is responsible to my Client for the false imprisonment.

My Lords, as to the novelty of the action I shall say but one word: that the same objection may be raised to any action against a Judge of the superior courts, for any private wrong; and it is a proud and pleasing reflection, that there is extreme novelty in any species of action, or even imputation against any of the superior Judges of the Country. If there be any thing in the objection of novelty, it would be equally forceable as an argument to shew, that a Chief Justice

could not be indicted for murder, or robbery—but indeed this objection I think sufficiently answered by mentioning it.

I shall now follow Mr. *Pennefather* in a few observations upon some of the other points, which he has laboured in this case; first, where he insists that this must be taken as a Judicial act, because it is averred to have been done by the Lord Chief Justice, as Chief Justice; and we have not traversed the fact of its being done so. In order to sustain the proposition, he cited *Eton* v. *Southby*; but this case really deserves no comment; I shall dismiss it by observing, that all it proves, is a fact in pleading: that an allegation "that *A. B.* having been possessed as a Tenant at Will," is a sufficient averment, that he then was Tenant at Will; but we are not disputing upon Averments. In this instance it is sufficiently averred, that the Defendant was Chief Justice, and as such, namely by virtue of the office of Conservator which that dignity conferred on him, issued this Warrant; yet, can it be seriously contended, that Issue should have been knit upon the title the Defendant chose to stile himself by, when he issued this Warrant. What would the Jury have to try? Certainly something very immaterial, the appellation the Defendant chose to be addressed by at that moment. If any replication were put in, it must be in this form, "that the Defendant did not issue the Warrant as Chief Justice." See then what an absurd issue the Jury would have to try. But it is matter of Law in what capacity the Defendant acted; and the real and substantial question is, whether this be a Judicial or Ministerial act. Now can the nature of the act depend upon the name or title of the actor? Is the quality of the fact to be changed with the dignity of the doer? But really it does not appear that I should be at all justified in detaining your lordships upon this part of the case. It is not by the name of the person who did the act, but the circumstances of the case, that any man can justify the imprisonment of a free born subject of the land.

The second point in Mr. *Pennefather's* argument to which I have to entreat a few moments of your attention, is that part of the case, in which without admitting the

distinction between Judicial and Ministerial acts, he still acknowledged its authority, by the pains he took to prove the granting of a Warrant, to be a Judicial act. He first insisted, that no action would lie for unjustly issuing a *Fiat*, and then he compared Warrants to *Fiats*. Now, it may be conceded, that no action would lie in the first case; but if Warrants be *Fiats*, as Process to bring the party in, then the authorities and cases, in which actions have lain against Justices of the peace for issuing Warrants, are all mistaken; and a discovery is now made, that by comparing Warrants to *Fiats*, the Defendant would have been entitled to non-suit the Plaintiff in those actions; and a mighty discovery truly,—a brilliant discovery of a secret concealed from all the Counsel of former Defendants, and reserved for the advocates of a Chief Justice. Perhaps, however, as the merit of the discovery belongs to the Counsel of a Judge, the advantage of it equally belongs to him alone. But if this be a point of non-suit only for a Chief Justice, this absurdity would follow, that if this identical Warrant had been issued by my Lord Mayor *Abraham Bradley King*, (who is a Magistrate of great dignity, and I presume, entitled to some veneration from the Counsel at the other side,) if the Lord Mayor who is also a presiding Judge at the Sessions, had issued this very Warrant, an action would have lain against him, because it was Ministerial; though to the extent of trying and punishing this crime, he is as fully a Judge as the present Defendant; and yet, that for the issuing precisely the same Warrant, no action would lie against this Defendant; so that the Lord Mayor, acting within the bounds and limits of his authority, might be ruined for doing that, which the present Defendant may do with perfect safety.

But it is contended, that the superior quality of the Chief Justice alters the act into a Judicial one.—It becomes a *Fiat*, and not a Warrant; and no action can be maintained. In truth, however, there is no similitude between the two.—A *Fiat* is only an order to an officer to make out a Writ, or Process—a Warrant is the Process itself. The Writ which issues on the *Fiat*, must of necessity be returnable into the Court out of which it issued—a Warrant is not returnable at all; and is in

its nature of force to bring in a party to any Court, having cognizance of the offence, and within the territorial limit of the authority of the officer who granted it. In 4 *Blu.* 2, it is laid down, that the Warrant may be either general or special; general, to bring the offender before any Justice;—special, to bring him before any particular individual Justice; so that this Warrant is part of a case afterwards tried before the Defendant, only because he chose not to send the Plaintiff to the Sessions. It has therefore no necessary connection with the Court of *King's Bench*, nor indeed any other connection with that Court, but what the Defendant chose to give it.—It is not process to commence a suit before the Defendant—he might, if he pleased, have by his Warrant sent the Plaintiff to a Court, where he never would have had any interference with the trial.

Next, the case of *The King* v. *White*, cases *Temp. Hard.* 97 has been relied on—now what does that case prove? Does it convert any Ministerial act into a Judicial act? Does it alter or qualify the authority of the cases I have mentioned? It proves nothing but what is familiar in every days practice: namely, that all officers of justice are under the controul of the *King's Bench*. When complaints are made to that Court of any Magistrate or its officers; if the fact be admitted, they grant an attachment; if the fact be disputed, they grant an information to have it tried by a Jury. The case were one for an attachment, and is a mere *ex parte* report—a loose note of an insignificant case. In a case in *Ireland*, *The King* v. *Kelly*, *Irish Term Rep.* 204, the *King's Bench* attached Mr. *Kelly* for calling a meeting of the County. Lord *Earlsfort* there lays it down, that the Court of *King's Bench* has a general controul over all inferior Courts and inferior officers, and the power of punishing them by attachment for misconduct; and supposing the case of *The King* v. *Kelly* to be thus, it would follow, that an attachment might upon these admitted principles, have been granted, if the constable had disobeyed the warrant of any other Magistrate. In truth, *The King* against *White* proves nothing but what has not been denied, viz. the power of the Court of *King's Bench* to punish the misconduct of inferior officers, as for a contempt of that Court.

Thus I have, I trust, shewn you, that the arguments drawn from the cases of *Fiats* do not apply; and if they did, they would prove too much, and are encountered by all the cases in which Magistrates have been convicted in actions for issuing Warrants. The capacity in which the Defendant acted, is a matter of law, not capable of being tried by a Jury, and not altering the nature of the act.—That act was a Ministerial act, which is not protected from actions; and not a Judicial act which is protected.—And lastly, this arrest upon those pleadings is a false imprisonment, for which the Defendant is bound to abide the verdict of a Jury.

I have now my Lords argued the case; and have only to add a word or two to some general topics introduced by Mr. *Pennefather*. First, he said, that this was one of that class of injuries, for which there is no remedy. He cited the Case of *Le Caux* v. *Eden*; but it does not prove by any means what he would wish to establish; it proves the reverse; for it was said, that the aggrieved party there, though he did not get immediate redress, had an appeal to the Court of *Admiralty*, which would be efficacious. *Le Caux* v. *Eden* does not prove, that there was no remedy for an injury; it only stated, that the remedy was different from the Action then sought to be maintained. *Doug.* 594.

Mr. *Pennefather* talked of a Case of felony, in which the Party had no redress by the recovery of damages; but it could not escape observation, that if the party was not remunerated in money, he has compensation in the punishment of the Offender. The Counsel commented upon the expediency of suffering a private injury, for the purpose of effecting a public good. But though I admit most cordially, and sincerely admire the general principle, yet I deny its application in the present instance: for there is not the least necessity, that the Lord Chief Justice should consume his valuable time in issuing Warrants, when there is such an abundance of Justices of the peace, well salaried and paid for the purpose.—There was then no necessity that the Chief Justice should issue it,—plainly none.

—He has bestowed some words upon the propriety that existed for the Defendant's interference in the Case of the Catholic Delegates.—I do not see any such propriety. There were many persons who could with the greatest propriety and delicacy fill his place on such an occasion; but if as Mr. *Pennefather* would contend, the Chief Justice acted in his Judicial capacity, in granting a Warrant against my Client—See to what a predicament he has been reduced—He has first judged my Client—secondly, resorted to the mockery of a Process to bring him to Trial—and thirdly, judged him again.—And what would my Lords, be the consequence of suffering this extraordinary and monstrous power in a Chief Justice? Why, my Lords, if my Lord *Ellenborough*, the *English Chancellor*, or *Master of the Rolls* had conceived any malice to any of your Lordships to morrow, they might issue their Warrants, and drag you from your Bench to answer a fictitious charge before them; and all this subjecting themselves to no penalty. Mr. *Pennefather* has lately told us, that the subject could resort to Parliament in the event of any unwarrantable proceedings on the part of the Chief Justice. Why my Lords, what a mockery this is! If the Irish peasant has been aggrieved by a Chief Justice, is it a consolation for him to have the liberty of making a miserable passage to Holyhead; then walking barefoot to *London*; and lastly, stating his wrongs to the Imperial Parliament in a language unknown to them. What a consolatory prospect has Mr. *Pennefather* opened for the peasantry of the land against the errors of officious, intermeddling, or prejudiced Justices.

And now, my Lords, the case rests with you.—It remains for you to determine for the first time, whether there be an arbitrary and capricious power lodged in the Chief Justice, to arrest whom he pleases, without offence committed, or accusation made. If this power resides in any Chief Justice, what are our Constitutional pretences to liberty? We are the sport of a vile mockery, that tells us that we are free, but liable to imprisonment at caprice; and refers the redress of an injured peasant, not to the Laws and a Jury, but to

the good will of a ministerial majority in Parliament. I do therefore not rely so much on Cases and Authorities, as on first principles. I rely on the nature of the Constitution—on the liberty of the subject—on the very spirit of the government to which we have submitted. As a written Authority, I merely mention the great Charter, knowing that you, my Lords, will delight, that at the end of six centuries, you are afforded the glorious opportunity to confirm its provisions, although a brother Judge be the sufferer.

Tuesday, 24, Nov. For the Defendant.

MR. RADCLIFFE. My Lords, the position I shall endeavour to establish is this, that no Judge of any of the superior Courts of Record is answerable in a Civil Action, for any act (though out of Court) done in the exercise of an authority, which he possesses, solely in virtue of his Judicial appointment, and not in his private and individual capacity. We are not obliged to contend, that a Judge of the *King's Bench* can, of his own will, imprison any of the King's subjects; that is a position, which I conceive, I am not bound to prove in support of this plea—however, the case from *Rolle's* abridgment, cited by Lord *Hale*, might warrant me to do so;—but the question is raised, before what Tribunal is the Judge to answer for any imputated misconduct: whether in a civil action to the party, or to the King in Parliament, as the only Court for the trial of the King's Judges. It is a question interesting in the extreme to the community at large, whose protection depends upon the dignity and independence of the superior Judges, in the administration of the laws of the land; - an independence liable to be invaded, as well by popular clamour, as by the undue interference of the crown.

My Lords, I shall keep clear of all superfluous matter, in the consideration of this subject, and come immediately to the substantial question before the Court. I am willing to concede to the Gentlemen on the other side, that if any Action will lie, this is the proper form of Action; I also concede, that no *ordinary* Justice of the Peace can justify in trespass, without setting forth a cause of Com-

mitment and the Informations taken upon Oath, as the ground of his Warrant;—and in speaking of an *ordinary* Justice of the Peace, I mean one assigned to keep the peace by the usual Commission, and not a Justice constituted by Statute Judge of the offence.—In return for these concessions, I beg leave to assume, that no Action lies against a Judge of record, for a matter done by him as Judge; and that the Act complained of, was not done in the Defendant's individual capacity, but in the exercise of some authority belonging to his Office—The Warrant signed by him as Chief Justice imports, that he did the act as Chief Justice; for if it was not done as such, and by virtue of his Office, the fact should have been traversed upon the record, and not admitted upon the Demurrer; and in addition to the Cases put by Mr. *Pennefather* to shew such should have been the Plaintiff's Course, I refer you to the Case of *The King* v. *Neals* in reports *temp.* Lord *Hardwicke*, p. 98, and the Case of the *Grocers Company of London* v. the *Archbishop* of *Canterbury*, in 2 *Blac. rep.* page 776. From these Authorities, if any were necessary, it appears that the demurrer admits every fact well pleaded, and that a traverse may be taken to matter of Law, if it be intermixed with matter of fact.—The Case of the *Grocers Company* was an Action of "*Quare Impedit*," and the Plaintiffs in their replication traversed, that it belonged to the Defendant to "present to the Church &c," and it was decided, "though the objection "was, that the traverse was of matter of Law, whereof "the Jury could not judge, that being law mixed with "fact, it was clearly traversable."—

I might therefore now contend before the Court, that the admission being once made, that the Chief Justice acted as such, there is nothing for the Court to try; for it being conceded in Argument, that no Action lies against a Judge for a Judicial Act; and it being admitted by the pleading, that the Act was done by the Defendant as Chief Justice, and therefore Judicial, there is no question for the Court. But it is my Clients wish to bring forward the abstract question, and not to rely upon any point of pleading, save so far as to have it taken as admitted on the record, that he ex-

ercised some authority possessed by him in right of his office of Chief Justice. In the first place it is contended, that he acted as a Justice of the Peace merely; but it is clear, that he could not act as Justice of the Peace, because the general commission of the Peace, supposing him named therein, only runs into counties at large, and not into cities or corporate towns, and particularly not into the City of *Dublin*, whereof the Aldermen are the proper and peculiar Magistrates; though in latter times other Magistrates have been joined with them as Justices by peculiar statutes.—

My Lords, it was at first contended by Mr. *Perrin*, that to protect a Judge from an action, his act must have been done on the Bench in open Court; and the case in 12th *Coke*, 23, was cited by him; that case rules, that a Judge of record is not liable for what he does in open Court; and because the case says, that he shall not be liable for what he does openly in Court, this strange conclusion is drawn, that he is liable for what he does out of Court, though purporting to be done by him as a Judge; a conclusion illogically drawn... However, as the Argument proceeded, the positions were narrowed; and it seemed at last to be admitted, that Acts done out of Court might be deemed Judicial; and I think it has been incontestably proved, and must be admitted, that there are many instances, in which a Judge acts Judicially out of Court, namely, in granting *Fiats*, taking bail, making Chamber Orders, issuing Writs of *Habeas Corpus* returnable before himself or any other single Judge, even in vacation; and I must add, that the private examination by the Chief Justice of this Court, in taking the acknowledgment of a Fine in his Chamber, is a similar act; and yet no man could imagine, that he is subject to an action for an irregularity in so doing. What does Sir *Eardly Wilmot* say, page 97; when speaking of the acts of a Judge done in and out of Court? "That the acts done in and out of Court form together that system of practice, by which the benefit of the Law is dealt out to the people."

My Lords, the books of reports do not furnish many cases respecting the acts of Judges out of court being deemed Judicial or the contrary; because the cases in the books relate to inferior jurisdictions, which it was the po-

by of the law to controul, and confine within their proper limits; and that even as to those Courts, certain acts might be deemed Judicial, although done off the Bench, so as to protect the Judge from a civil action: such as taking affidavits, and bail, and issuing process, as is collectible from the case of *Medcalf* v. *Hodgson* in *Hutton* page 160; which was an action against the Sheriffs of *York* for taking insufficient bail. They were Sheriffs of the county of *York*, and, as such, Ministerial Officers; but it appeared that they were Judges of an antient Court in *York* City, and also time out of mind keepers of the goal there; and that on parties being arrested, they were to take bail, on their finding sufficient securities; it was resolved "That this act was done by them, as Judges of "such Court, and for this Judicial act, no action lay; "and that they having two authorities *in ista persona*, it "shall be taken to be done by that authority, by which "they have power to bail, and that is, as Judges of the Court." So the court thought, that at all events, it being equivocal in which capacity they acted, Ministerial or Judicial, they would take it that they acted Judicially, and that no action would lie. That was an Act not done on the Bench, but out of Court by an inferior Judge. If it had been an Act done upon the Bench, there would have been no necessity for the intendment; and from this Case strongly appears the anxiety of the superior Courts, to protect even the inferior Judges, whilst acting in a course of Justice—within the scope of their jurisdiction—in the exercise of their Judicial office.

But it is further contended, that admitting the issuing *Fiats*, and writs of *Habeas Corpus*, and taking Bail and recognizances, to be judicial Acts: yet the Act here complained of, the issuing this Warrant, is a Ministerial and not a judicial Act; and the argument made use of is this, that the Chief Justice of the *King's Bench* has the power of a Conservator of the Peace, whose office was ministerial, and that therefore he acts Ministerially; but does it follow, that because he possesses an authority as part of his office of Chief Justice, which a Conservator or Justice of the Peace might have exercised, he acted not as a judge, but as a Conservator of the Peace; and are your Lordships prepared to say that because the Chief Justice exercises the powers of a

conservator of the peace, as one branch of his authority; he is to be degraded from his high office, and put on a level with the lowest minister of Justice. I do not mean to deny, that many officers of inferior Courts are both Judges and ministerial officers.—The Sheriff is both;—he is a Judge in his County Court; and a minister in the execution of many of the King's Writs. The Coroner is a Judge on an inquest, on view of the body; but may be ministerial, in obedience to a Writ.—The Justice of the peace, in like manner, may be ministerial in keeping the peace; but is a Judge at quarter Sessions, in conjunction with others, some of whom are of the *Quorum*; but it is to be observed, that a Justice of the Peace is not a Judge, until he sits at the Sessions; and that only by meeting certain persons at a certain place; and is not singly a Judicial officer, as each superior Judge is: except when he is made a Judge by Statute; and there are numberless instances of Cases, independant of those already cited, which shew the distinction between a party acting ministerially and Judicially. It has been the policy of the Law, administered by Judges of the superior Courts, to keep inferior officers within the limits of their duty; and the various branches of their offices distinct; but there is no case to be found in the books, where even an inferior Judge, having certain powers, apparently ministerial, incident and inseperably annexed to his office of Judge, has been deemed, in their exercise, to have acted ministerially; and therefore, to be excluded from the protection afforded him as Judge.

I have read over all the Cases cited by the other side, and cannot find a position to Warrant such a notion; and all of them are Cases, not of officers exercising, as Judges, powers apparently ministerial; but of officers, one distinct branch of whose offices is executive, and another Judicial; and there the branches are as distinct, as if held by different persons; and no Case has been cited to shew, that even a Justice of Peace would be liable to an action, for issuing his Warrant as Process to a party to appear before him, in respect of an offence whereof he should be constituted the Judge. I refer your Lordships to 2 *Hawk.* p. 136, lib. 2, section 20. This passage has

not yet been cited; and there Mr. Serjeant *Hawkins* has taken that same distinction, which may be fairly applicable here. He says; "And perhaps there may be this difference between the Warrant of a Justice of peace, for such causes, which he has not authority to hear and determine as Judge, without the concurrence of others; and such Warrants for an offence which he may so determine, without the concurrence of any other; that in the former Case, in as much as he rather proceeds ministerially than Judicially, if he act corruptly, he is liable to an action at the suit of the party, as well as to an information at the suit of the King: but in the latter Case, he is punishable only at the suit of the King, for that regularly no man is liable to an action for what he doth as Judge."—

My Lords, I conceive, that the King's superior Judge of Record cannot act ministerially, unless perhaps in obeying a particular Writ, issued by authority of a Statute; and distinctions, which might be taken as to inferior Judges, cannot apply to them, who are not inferior to any others, and do not act by others command or authority; and the confusion arises from considering those acts, which are purely ancillary to the Judicial exercise of the office, as ministerial, when in fact, there is a material difference between doing an act, which is ancillary to the business of the Court, and one, which is ministerial; as in the Case of *Flats*, the Judge does an ancillary, but not a ministerial act.—My Lord Chief Justice here takes a fine, which must be done out of Court; yet still he does it as a Judge, and not ministerially.—Many things must be done out of Court by a Judge, or the business could not proceed; and your Lordships know, that it is usual to refer to one of the Barons of the *Exchequer*, being thereby ancillary to the Court, to report, whether an answer is short or full, or the like; and are you prepared to hold, that in doing so, they are acting ministerially, and not ancillary to the Court, in their office as Judges, though in obedience to an order of Court; and that a mistake might subject them to actions? But is it not, that their acts in such Case, are ancillary to the business of the Court; and what is the difference between those acts, done by the Judges of the other Courts, and the act of the Chief Justice here,

in furtherance of the business of his Court?—If there be any distinction, allow me to say, it is in favour of the Defendant; the Chief Justice of the *King's Bench*; for many of the instances mentioned to the Court, such as *Fiats* &c. are, comparatively speaking, of modern origin; but the act of the Chief Justice is by virtue of a Jurisdiction inherent in the office, and coeval with it; and if the power was delegated by the Court; it is a delegation beyond time of memory; for there are no traces to be found of any period, wherein the Judges of the Court of *King's Bench* had ceased to exercise this authority, as part of their original office; and therefore, it is not a mere practice of two or three hundred years, but a power inherent in the office of Judge of the *King's Bench*; for when the Court of *King's Bench*, in practice, moved with the person of the King, on its coming into a County, it suspended all the inferior Criminal Jurisdictions; and the Criminal law was to be administered by the Court of *King's Bench* alone.—Now it was quite impossible, that the Judge could perform all the business in open Court.—Besides, it sat at stated times; and it was equally impossible, that the whole of the vacation should be left without the administration of Criminal Justice; of course their authority was delegated to individual Judges, so that they could receive complaints, and take informations, commit, and take bail in vacation, Arrest for treason, and other crimes, and issue Writs of *Habeas Corpus*; all of which were as material to be done by individual Judges, as the issuing of *Fiats* on the civil side of the Court.—I really cannot conceive any difference between the acts of the Judge in the one Case, and the other.—

On the same principle, every Judge of the Court of *King's Bench* is conservator and coroner throughout the kingdom; and that by the mere Writ or patent appointing them, without any other commission, as inherent in, and part of the office of Judge.—If the Chief Justice ceased to be Judge, he would cease to be a conservator of the peace and coroner; and is there any question, that at the time when the Judge's office determined on the demise of the Crown, though that of an ordinary coroner did not, the Judge of the *King's Bench* would also have

ceased to be a coroner: it might as well be said, that because the Defendant, by his office, gives counsel to the King in Parliament, if he dropt any observations reflecting on the character of any man, that he, not sitting in Judgment, would be liable to an action at common law for slander or the like, although fulfilling part of his duty as Judge.

In order to shew your Lordships, that acts of this kind are always construed by the Courts of Justice, as done judicially, as much as granting *Fiats*, or other Judicial proceedings in Chamber, I will draw your attention to one or two Cases, which I think ought to decide the question—And first, to the Case of *The King* v. *White*, already cited, where there was an attachment against a constable, for not obeying the Judge's Warrant, as for a contempt of the Court itself. The act of the officer was a contempt of the Court; and the Court could not attach him on any other principle, than that the disobedience of the command of a single Judge, was a contempt of the Court; and it is incontestibly true, that for the disobedience or contempt of the Warrant of a Justice of the peace, the remedy is only by indictment; and the superior Courts will never interfere by attachment, for a contempt of any Court but their own—As in *Strange* 567, *The King a Burchett*.—"The Court ordered an attachment *Nisi* against the "Town Clerk of *Guilford*, and a Defendant convicted "on the game act, for granting and issuing out a Re-"plevin of goods distrained for the penalty." A motion was afterwards made, that the order should be discharged, which was done; "The Court holding, that it was only a "contempt of the inferior Jurisdiction of the Justice of "the Peace; and in such Case the *King's Bench* never in-"terposed, and they would not attach for a contempt "of an inferior Court."—So my Lords, taking those two Cases together, in the one, where the Court did attach for a contempt of an order of a Judge; and in the other, where they refused to attach for the contempt of an order of the Justices, can there be a doubt, upon authority and principle, that as ancillary acts may be done in civil, so they may be done in Criminal Cases?—That there is no law which draws any distinction between them; and that the Judges of the Court of *King's Bench* may and are

bound to bring persons in this manner to trial, in that court. There is a case, of the authority of which, I shall say nothing; but it is extraordinary, that when no such action as the present has ever been thought of, there should be even a *dictum* to be found, as to the right of exercising the judicial authority here complained of. The case of *The King* v. *Almon*, in Sir *E. Wilmot's* reports, is quite to the point.—The judgment was never delivered in court; but it was the argument of Sir *E. Wilmot*, as prepared by himself; and if the Defendant had resisted, was intended to have been delivered as his judgment on the case;—in fact it was every thing, but a decision. pa. 265.

The case was this: there was a conditional order for an attachment obtained against the Defendant for libelling the Chief Justice, charging him with acts, as illegally done, being done out of court.—The attachment was granted; and the cause attempted to be shewn was: That the Chief Justice had been acting only in his chamber, and not in his court; and the very point arose, whether there was any solid distinction between acts done, and orders made in chamber, and out of court. The act charged upon the Judge was, his illegally altering the record, in the case of *The King* v. *Wilkes*; and the motion grew out of a publication on the subject, by *Almon* the printer. It was a very laboured argument by Mr. *Justice Wilmot*. He says, "and therefore the "question resolves itself at last into this single point, "whether a Judge, making an order at his house or "chamber, is not acting in his judicial capacity, as a "Judge of the court; and whether both his person and "his character are not under the same protection, as if "he was sitting by himself in court. It is conceded, that "an act of violence upon his person, when he was mak-"ing such an order, would be a contempt punishable by "attachment; upon what principle? For striking a "Judge in walking along the streets, would not be a "contempt of the court. The reason therefore must "be, that he is in the exercise of his office, and dis-"charging the functions of a Judge of this court." Again, in speaking of those acts of a Judge out of court, he says,

" But still they are emanations of judicial power; and " whether they have more or less weight, they are acts " done by the Judge in the same capacity and cha- " racter, in which he sits here; and whether he is taking " an affidavit out of court, or pronouncing a solemn " opinion in court, the reason of resenting the indignity " is the same; and *ubi eadem est ratio, ibi idem est jus.*" And then in page 268, he goes on and says, " The dif- " ference between the force, the weight, and the energy " of an order, and of a rule, respects only the mode of " executing them." Again, " I can make no difference " between a Judge acting in court, or judicially out of it, " but that he has not the same plenitude of power in the " one case, which he has in the other; but still he acts " by virtue, of the patent constituting him Judge of " this court, and of the power which the law gives him " in that character and capacity." Now, I beg your Lordships to attend to these words, " when he issues his " warrant as conservator of the peace, the Court punishes " the officer who disobeys it, by attachment, (confirming " the case of *The King* v. *White*) and why? Because it is " the act of a judge, in his judicial capacity. Indeed, it " is an obstruction to process, in that particular complaint. " But suppose he was calumniated for issuing such a war- " rant, would not the court grant an attachment for it?" I beg your Lordships attention to this opinion, deliberately formed; and intended to have been delivered in Court. But the Defendant, knowing that the detachment must go against him, did not stir further in the cause.

My Lord, it seems to me, that the act done here is nothing more or less than a *criminal Fiat*; like a *Fiat*, it is a process to bring the party before the Court. There must in fact, originally have been a more urgent necessity for those great magistrates to interfere personally, in granting warrants, and taking informations; particularly in cases, where there was a new offence, or where the inferior magistrates were afraid to act; and it was found peculiarly necessary, where there was to be a trial of an important case, before a full court, at the bar of the *King's Bench*—it was considered right and proper for the Chief Justice to issue, what is called a *Bench warrant*,

that is, a warrant granted by the authority of the court of *King's Bench*. So in this case, the Chief Justice's warrant was a process, peculiarly adapted for bringing in a party, who was to take his trial for a new offence, to be tried before the full court of *Oyer* and *Terminer*; it was proper, I say, in such a case, that the court itself, by one of its Judges, should issue the warrant of arrest.

I think, my Lords, a very strong argument arises out of the last statute of *Habeas Corpus*. It is a legislative opinion as to the law on the case, that an action will not lie against a Judge, even acting out of court, unless so provided by statute. By a clause, added on the second reading of the bill, a special action is given against him, for not granting the writ; and it was added, after a consultation with the Judges on the point, whether any action lay at common law, for refusing the writ. The act passed in this country in 1782; but had previously passed in *England*. It may be said, that the clause was made, not to give the action, but to inflict the penalty of £500; however, the taking the opinions of the Judges is an answer to that.

The case is also much strengthened by another argument; namely, that the statute, which gives Justices of the Peace liberty to plead the general issue, and give in evidence the special matter, does not include the superior Judges; and the statute which provides, that in actions against magistrates they must have a month's notice, does not apply in a case like this. If the legislature had contemplated the possibility of actions against them, for an act done in the execution of their offices, it certainly would have afforded them the same protection; but no mention whatever is made of the superior Judges, who in consequence, if the law be as the gentlemen on the other side contend, must be in a worse condition, than the ordinary Justice of the Peace.

My Lords, another argument, and I think not a weak one, is to be drawn from the silence of the books, as to any such action ever having been brought, though so many occasions must have offered since the origin of our law; and although actions nearly similar in principle were attempted, unsuccessfully; as in the case of *Damport* v.

Sympson, *Cro. Eli.* 520; and in 2 *And.* 47, which was an action against a witness, for what he said in a court of justice, in a matter material to the issue; and it was held, no action would lie. The court said, "if the "Defendant should be punished in law in this action, "there would be some precedent of it before this time; "but being, there is not any precedent found thereof, it "is a good argument, that the action is not maintaina-"ble."

As to the case of *Throgmorton* v. *Allen*, it has been argued by the gentlemen on the other side, that it cannot justify the issuing such a warrant as this, by the Chief Justice; and that the case of *Throgmorton* v. *Allen* is nothing but the justification of the officer, who was bound to obey the Judge; but if the officer could not justify under a similar command of a Justice of the Peace, then there must be consequently a paramount authority in the Judges of the court of *King's Bench*, to make the justification of their officer in similar cases available; for the parole command of a Justice of the Peace to arrest a person, would be no justification of the constable; he must shew a warrant under seal; and that he must do so, in order to justify an arrest, I believe will not be disputed; whereas, that case decides, that the officer might justify under the parol command of the Chief Justice.

My Lords, an Argument has been raised, that the other persons beside the Chief Justice of the *King's Bench*, such as the *Chancellor* and others, are equally conservators of the Peace, by virtue of their offices; and then the question is put, whether those persons, if they issued their warrants, would or would not be liable to an action? The answer is quite plain. If they exercise the authority of conservators of the Peace, as part of a judicial office, then they would be protected by that office; but if they do not, and are simply conservators of the Peace at common law, then they would be liable to actions, as ordinary conservators of the Peace; but most of those persons were conservators, as members of the *Aula Regis*.

The protection of Judges rests on principles of policy, and not on technical rules; and the arguments drawn from the principles of public policy are, I submit, unanswerable—The common law refuses to entertain questions, and will even rescind the most solemn contracts, on the ground, that the enforcement of them would induce political inconvenience. Against a party maliciously making a false affidavit in *Chancery*, it was held no action would lie, *Ayre* v. *Sedgwicke* 2 *Rol. rep.* 197, 198; and for this good reason, that it would deter persons from becoming witnesses, if they were liable to the action of every angry and disappointed suitor—On the same principles, no action lies for a felonious taking; the remedy is not there, but in another place,—not to the individual, but the public; and on this principle, lest the public Justice should be unenforced, in consequence of the acceptance of individual compensation;—and that the law will rather permit a private wrong, than a public mischief. In the case of contracts, the Courts go so far in enforcing this principle of public policy, that the officer, who by a solemn deed parted with his half-pay, was allowed to recover it back by an action: as in the Case of *Lidderdale* v. *The Duke of Montrose* 4 *Term. Rep.* 248: and also the Case of *Stone* and *Lidderdale* in 2 *Anstruther* 533; and another, *Flar'ty* and *Odlum* in 3 *Term. Rep.* 681, on the same subject.—And what do these Cases decide? That though a party may have entered into a fair contract,—though his deed be not impeachable for fraud or informality; yet if it induces a political inconvenience, the Courts will not enforce the performance of the contract; and therefore the policy of the law would not allow that pittance, provided for the half-pay officer by the state, to enable him to come forward in time of necessity, to be confiscated or diverted to other purposes. The Case of Jurors was already mentioned; and a witness and counsel have the same protection in a Court of Justice. The law however goes even further; for though a contract is otherwise valid, and is not against the policy of the state; yet if it is in fraud and to the prejudice of a third person, it becomes voidable, and cannot be enforced against the parties to it; as is the every day practice, of defeating an agreement (on a composition

with creditors) to pay one of them a greater sum of money, than the composition agreed to by all.—So says the policy of the law in this Case, that the independance of the Judges of the superior Courts must be maintained; for if they are degraded or reduced to the level of common persons,—if they are to be disgraced, by being dragged before the common tribunals, in actions at common law, the authority of the Judges will be weakened, and their office brought into disrepute, to the great injury of the common-wealth, in the administration of public Justice; whereas, as to the inferior Judges, the policy of the law is rather to keep them in dependance on the King's Courts.

But my Lords, I beg of you to consider the consequences of the argument at the other side.—If the Chief Justice of the *King's Bench* is subject to an action, he is liable to be indicted at the quarter Sessions, before the inferior Magistrates, for the same offence; for it cannot be doubted, that where an action lies for false imprisonment, so will an indictment—2 *Inst.* 55, and also *Wilmot's rep.* 95; and your Lordships must come to this monstrous conclusion, that the Chief Justice may be indicted for this false imprisonment, at the quarter Sessions, or may have an information granted against him, in the Court of *King's Bench.*—Does the law furnish an instance of such absurdity? If the Chief Justice is a common conservator of the peace, he is also a common coroner; and he might be fined in Court, if he refused to attend on an inquest;—for so says the law; and allow me to observe, that the office of coroner is not discontinued in the person of the Chief Justice: we have a very late instance of the exercise of it; for it is said, that Lord *Ellenborough* the Chief Justice of *England*, sat as supreme coroner, upon the body of the late Mr. *Perceval.* And therefore my Lords, if you allow this demurrer, you must hold, that the Chief Justice of the *King's Bench* is not only liable to this action, but to an indictment for the same offence; for if it would not be a good plea to an action, it is no bar to an indictment.

My Lords, I have avoided as much as possible, going

over the arguments of those who went before me; and I have endeavoured, as far as was in my power, to explain the meaning, and to argue in support of the plea; and what I contend for is, that it was an act done in the exercise of the Defendant's Judicial office, as ancillary to the Court in which he presides; and that no act done in that manner, as or connected with the office of Chief Justice, is examinable in a Civil action, however it may be in another place,—before the King in Parliament;—that it is contrary to the policy of the law;—and that if it was allowed, the situation of the superior Judges would not be worth holding—They would be harrassed by actions, and persecuted by indictments, according to the caprice of the disappointed suitor, or apprehended delinquent;—and taking all these matters into your serious consideration, I trust your Lordships will be of opinion, that the plea is a sufficient bar, and this action not maintainable.

MR. BURNE.—My Lords, I am counsel for the Plaintiff, to support the demurrer to the plea filed by the Defendant; and your Lordships are called on by this plea, as it stands, to decide this abstract proposition; namely, that the Defendant having issued his Warrant against the Plaintiff; and having thereby called himself Chief Justice of the Court of *King's Bench*, no action lies against him; though such Warrant was utterly unfounded, and an action for an arrest under it, would be well maintainable if issued by any other Magistrate. I confess, it does appear to me to have been unnecessary and imprudent, to bring forward such a proposition; and I felt great pleasure in hearing it acknowledged, that the present plea was not to be considered as the plea of the highly respectable Defendant, but of some person, more anxious to enlarge the powers of his office, than to consult his personal feelings. It will be my duty, to endeavour to shew your Lordships, that the ground relied on in this plea by way of justification, cannot shelter the Defendant from liability to the present action; and let it not be understood, that I mean to dispute a principle, which, as far as my information goes, is a wise, necessary, and useful principle, not to be disputed in a Court of Justice; namely, "that where a "Judge does a Judicial act, and in his Judicial capacity, For the Plaintiff.

" no civil action can be maintained against him." I conceive this principle to be essentially necessary in the administration of Justice, as well for the protection of the Judge, as for the benefit of the suitor; and if my client's case were to be sustained, by endeavouring to overturn it, I would tell him, that it was but of my power so to do; but I feel a strong conviction, that I shall be able to satisfy you, that the case of the Plaintiff can be effectually sustained, without infringing on that principle.

My Lords, various definitions have been given, as to what should be considered a judicial act; and I am disposed to adopt the most broad and comprehensive. I would therefore define a judicial act to be, " whatever " act a Judge does, in his judicial capacity; and which he " cannot do in any other." There are certainly two exceptions to this rule; namely, refusing the writ of *Habeas Corpus*; and making an improper return to a *Bill of Exceptions*; but these cases depend on particular acts of parliament; and as to all other acts done by a Judge, whether in court or out of court, if they cannot be done in any other than his judicial capacity, they are judicial acts; and in those, I include acts done in chamber, in furtherance of a case depending in court; because they are acts, which none but a Judge can do. The issuing of *Fiats*, making orders, reporting upon answers in the Court of *Exchequer*, and such like, are acts which can only be done by a Judge, and by no other person; and must be done in a judicial capacity; but there are other acts of a Judge, which may be done in another capacity. The act of issuing a warrant in a case like the present, is one which may be, and in this instance must have been, done in another capacity. There is no question, that the Chief Justice of the *King's Bench* is, by Virtue of his Office, a Conservator of the Peace, and as such, may issue his warrants; but he differs in two respects from the ordinary Justice of the Peace: first, in the mode by which he acquires the situation; because he acquires it *Virtute Officii*: and secondly, in extent of jurisdiction; for, whereas the one is circumscribed in his authority, which is confined within a limited jurisdiction, the authority of the other runs throughout the entire kingdom; but still,

the same act cannot be judicial, when done by one person, and ministerial, when done by another. The issuing of a warrant by a Justice of the Peace is unquestionably a ministerial act; and it cannot become a judicial one, because done by a Conservator. The real question is, could the Chief Justice have issued that warrant, as a Conservator of the Peace? I think I shall be able to shew your Lordships, not only that he did issue it in that capacity, but that his right to issue it was derived from thence; and that he could not legally have issued it, in his capacity of Chief Justice.

No offence of any kind is alleged by this warrant, or by the plea at present under consideration, to have been committed by the Plaintiff; and of course, he appears before your Lordships an innocent man, against whom a warrant has issued, and under which he has been arrested, without any allegation of criminality, upon which the issuing of it could be justified. It stands therefore, totally distinct from the case of a warrant, issued either after indictment found, or in consequence of a charge of treason, felony, or breach of the peace. It is issued before indictment found; and without any offence either charged or alleged. I will not go into the various distinctions, as to the power of issuing warrants, before indictment found; there is a great variety of opinion on that point; but I can adduce to your Lordships a legislative opinion, that, for an offence under treason or felony, no warrant could be issued by any Judge of the Court of *King's Bench*, before indictment or information, till the act of the 48th *George III.* c. 58.

It is but justice to say, that this act has been suggested to me by Mr. *Perrin*. It enacts that, "whenever any "person shall be charged with any offence, for which he "or they may be prosecuted by indictment in the Court "of *King's Bench*, not being treason or felony; and the "same shall be made appear to any Judge of the "same court, by certificate of an indictment, or information being filed; it shall and may be lawful for such "Judge to issue his warrant, under his hand and seal, to "hold the party to bail." From these words it is clearly

to be infered, that, prior to the enactment of the statute, it was not considered lawful for the Chief Justice, or any other Judge of the court, to issue a warrant against any person, before indictment found, and without any charge or allegation of an offence. The Judge is authorized and enabled by the statute, to issue his warrant after indictment found, to hold the party to bail, in cases under treason or felony; and would not that be nugatory and absurd, if he had a still more extensive power, even before that statute was enacted.

But it is said, that the office of Conservator of the Peace, flows from the situation of Chief Justice; and that all acts done in consequence, must be considered Judicial acts; but see the absurdities that flow from such a position—The Chief Justice has various duties, powers, and authorities, which devolve on him *virtute officii*.—He becomes Governor and Trustee of various charities; but suppose a case however improbable—suppose a case of peculation—of an embezzlement of that money, of which he was the Guardian or Trustee by virtue of his office of Chief Justice, shall it be said, that because he derives the character of trustee *virtute officii*, he shall not be liable to a civil suit for the breach of trust, and be compelled to refund the money embezzled? no! such doctrine could not be sustained, and the reason is clear; because he cannot be protected from suit, where he acts in a capacity not peculiar to a Judge, but in which other persons beside Judges are capable of acting This is what distinguishes the present case from all the cases alluded to. In the issuing of *Fiats*, the Judge acts judicially: because he could not issue them in any other capacity, than that of a Judge; so also in the case of reporting upon answers by the Judges of the Court of *Exchequer*, they can only do so as Judges; so the issuing of a writ of *Habeas Corpus* is an act, which can only be done by a Judge, and in his judicial capacity; therefore, the better opinion was, that before the statute, no action could be maintained against him for refusing to issue it; but as soon as it was made a ministerial act by statute, and the Judge was bound to issue the writ, at all events, the action lay on the penalty against him for his refusal; for the *Habeas*

Corpus act gives the Judges no discretion; but it is mandatory on them to issue the writ. The question in the present case comes to this,—the Chief Justice having in himself the two capacities of Judge, and Conservator of the Peace, in which of them, was the warrant issued? But as it appears by the statute, which I stated to your Lordships, that a a Judge cannot, as such, issue a Warrant before indictment found, though as Conservator of the peace he may, will the Court presume, that the Warrant issued from the Chief Justice, in the character in which by law it could not regularly issue, and not in that, in which by law he was authorized to issue it Your Lordships are therefore bound to presume, that the Warrant issued from the Chief Justice ministerially, as a Conservator of the peace; and not in his Judicial capacity as Chief Justice; and when an action is brought against him for issuing such Warrant, he is bound to justify himself like other Magistrates, by shewing the grounds on which he issued it; he must shew an offence committed, or an indictment found; and cannot command the arrest of a person, who for any thing appearing in the Warrant, is perfectly innocent; and yet, if your Lorships decide against the demurrer, you must decide, that the Chief Justice has a power, derived from his being a Conservator of the peace, which can enable him to arrest any person in the community, without the colour of a charge or imputation against him.

But why should you establish such a monstrous proposition as this? What is the necessity? Where is the utility? Why tell the world, that there is an individual in this country possessed of so despotic a power, beyond what was possessed by the Chief Justiciary of the antient *aula Regis*, whose power was both obnoxious to the people, and dangerous to the Government which employed him? Yet in the plenitude of his power, he could not authorize the arrest of any individual in the Community, without charge or information against him. The plea now at argument, to which the demurrer has been put in, goes to establish the principle, that the personal liberty of every subject in the Realm is under the uncontrouled power and dominion of the Chief Justice of *Ireland*, who as a Conservator of the peace, can issue his Warrant for

the apprehension of any person he pleases, whether guilty or innocent, without the possibility of redress; though the injury should be the most unjust and oppressive.

The Case of *The King* v. *White* in the time of Lord *Hardwicke*, is not at all analogous to the present. Without going into any discussion of the authority of the book, it is sufficient to observe, that the Warrant of the Judge in that case was to arrest a man for felony.—Where such a charge is made, the Warrant of course is legal; and the Bailiffs disobeying the Warrant, ought to be attached. An offence was charged to have been committed by the person against whom the Warrant issued; and an offence nearly of the highest nature. Is that like the Case of a Warrant containing no charge, or even the slightest imputation of guilt? A Case in *Strange* 567, has been cited by the Gentleman who proceeded me. It is the Case of an inferior Jurisdiction having awarded an execution to levy a penalty; the party charged sued out a Writ of Replevin, and then the other party comes to the *King's Bench* for an attachment; and the application is refused, because the Court had no Jurisdiction; as the proper remedy was, by an application to the Court against which the contempt was committed. I confess, I cannot see any similitude between that Case and the present.—The other Case alluded to by the same Gentleman, is that of *The King* v. *Almon* in *Wilmot* 265, 268; and there the Chief Justice *Wilmot* is reported to have said, "That the officer that disobeys "the Judge's Warrant, is attachable"; and he also says, "That the slander of a Judge, for acts done by him in "his Chamber, is such a misdemeanor, as the Court will "punish by attachment." And there is no question as to that; because the acts of a Judge in Chamber, which can only be done by a Judge, are Judicial acts, except in the instances before alluded to. In that case the Judge was doing an act, which nobody but a Judge could do: namely, authorizing an alteration in a Record; whether he was rightly doing so or not, is immaterial; it is enough, that he was doing, what nobody but a Judge could do. But *Wilmot* is also reported to have said, "That the officer who disobeys a Judges Warrant is attachable, when "he issues his Warrant, as Conservator of the peace"—

Suffice it for me to say, that whatever authority may be given to the book, where it gives the opinion of the Judge on the matter before him, it certainly confers no authority on an "*obiter dictum*"; a totally extra-judicial opinion, which may refer to a case of felony after indictment found, or after information sworn, or charge regularly made; but not knowing the circumstances, you cannot give any weight to such a *dictum*, in a case like the present.—In fact, there is not a single authority, or well founded principle, to establish that monstrous proposition, which the Court is called on to decide for the Defendant.

But my Lords, it has been said, that if the issuing of such a Warrant makes the Chief Justice a trespasser, he may be indicted for it; and that such a proceeding would be unworthy of his situation; but have we not instances of Peers of the Realm, and Lords of Parliament indicted and imprisoned for trespasses and misdemeanors; and are not Lords of Parliament Judges of the highest court in the realm? But it is also alledged, that no such action as this was ever heard of before; allow me to say, that the argument on the ground of novelty, is an idle and a nugatory one, which I trust your Lordships will put out of your consideration. When I am asked for an instance of such an action, I have a right to reply, was there ever an instance of such a Warrant?

Upon these pleadings, as they now appear before the Court, my client is an innocent man dragged through the streets, and imprisoned in his native city for several hours, without any reasonable or probable cause whatsoever; and when he seeks for redress, the answer is, "true you have suffered; but the high situation of the "person who injured you, exempts him from any re-"sponsibility; exalts him above the law; and puts him "out of the reach of an action." What a gross absurdity! How inconsistent with the spirit of the British constitution! I lament the necessity of bringing such an action as this; and I trust that it will never recur again. There was in every district of the nation, a multiplicity of Magistrates, (and more especially in *Dublin*,) fit and proper

for the execution of this duty. The business peculiar and appropriate to the office of Chief Justice, is fully sufficient to occupy his time, without his stooping to interfere with matters so much beneath him. They should be left to the ordinary Magistrates; and I am persuaded, that if the highly venerated character, who appears as a Defendant in this action, were to be governed by his own unbiassed sense of rectitude and propriety, he would never condescend to mingle himself in transactions, so unworthy of his high and dignified station.

MR. RADCLIFFE.—If your Lordships will look into the Statute of 48th of *Geo. III. c.* 58, mentioned by Mr. *Bicne*, you will see, it is only a direction of a new mode of process, in particular cases respecting the revenue. It gives the Judge a new power to proceed *civili-criminaliter*; and to mark the Warrant in a particular sum, for which the bail is to be given; and if the party remains in prison, and does not enter an appearance, and plead to the indictment, it authorizes the party prosecuting, to enter a parliamentary appearance for him, and a plea of not guilty;—and the reason that treason and felony is excepted, is, because it would be totally derogatory of the whole system of the common Law, that in those cases an appearance should be entered in the absence of the party.

ON FRIDAY, THE 29th DAY OF JANUARY, 1813,

Hilary Term.

The Court gave Judgment.

MR. JUSTICE FLETCHER.—It is with great regret, that I am compelled to declare my dissent from the opinions of my Brethern, on this most important question.—I have felt it my duty, to investigate this subject, with more than ordinary care and attention; and anxiously to search out and scrupulously examine the foundations of that opinion, which, it now becomes my duty in the first instance to pronounce; these feelings concur with the respect due to my Brethern, from all of whom, I now for the first time, on a question of any magnitude differ, in requiring from me at greater length, and more in detail, than upon a less

important occasion, I should choose, the principles and authorities upon which, after most mature consideration, I have formed a decided opinion, that the Demurrer in this case ought to be allowed.

This is an action of trespass, for an assault and false imprisonment.—There is nothing particular in the declaration.—It states in the usual form, that the imprisonment was contrary to law, without any reasonable or probable cause.—To this charge, contained in the declaration, the learned and respectable Defendant has filed three pleas—the first, Not Guilty: the second, that he the Defendant is Chief Justice of the *King's Bench*; and that as such Chief Justice, he issued a warrant under his hand and seal, containing certain recitals, and commanding the persons therein named, to apprehend, and bring the Plaintiff before him, (the Defendant) or any of the Justices of the *King's Bench*, to be dealt with according to law.—That the Plaintiff was arrested under the warrant, by a person named in it, brought before the Defendant; and by him delivered to bail, for his personal appearance in the *King's Bench*, on the first sitting day of the then next *Michaelmas* Term, and for his attendance there, from day to day, until from Term to Term, to answer all such matters and things, as should be then and there objected against him on the part of *The King*.

To this plea, there has been a general Demurrer filed. Upon the third plea, issue has been joined. Its merits are not now under consideration. It is therefore, unnecessary to embarrass this argument, by any reference to it. The question now to be decided is, whether the matter disclosed in the second plea, be a sufficient justification for the Defendant. A most important question it is; and one involving consequences of the utmost magnitude. I am of opinion, that it does not contain sufficient matter of justification, or excuse; and therefore, that the Demurrer ought to be allowed. It is, in the first instance, observable, that there is no averment of the truth of the recitals in the warrant—no information stated in this plea—no other fact but this; that as Chief Justice he issued the warrant—nothing to induce the act, save that

virtute officii he did so. It is hardly necessary for me to go into proof of the *illegality* of the act, as *thus* set forth upon the pleadings.—The Defendant's Counsel did not maintain its legality.—Their main argument was, that however illegal his conduct might have been, yet the learned and respectable Defendant is not responsible in any action for it—that he was Chief Justice; and *virtute officii*, exempt from the consequences, which must inevitably attach upon any other individual, who should act, as he has done in this instance. This is therefore, an attempt to justify or excuse an act, confessedly and manifestly illegal—an arrest on the face of the plea, without reasonable or probable cause. As a justification for the Defendant, the person issuing the warrant, the recitals in the warrant, are quite immaterial, as they are not averred to be true. In order therefore, to bring the question to its true test, the recitals may, and ought to be, considered as struck out of the plea, the whole force of which consists in stating, an order by the Chief Justice, to apprehend a man; and to have the man so apprehended, brought before him, to be dealt with according to law; and thereupon delivering him to bail, to appear in the Court of *King's Bench*, at a certain time, to answer such things as should be objected against him, on the part of *The King*; together, with an averment, that he the Defendant, issued this order as Chief Justice. It would be an idle waste of time, to dwell upon the several authorities that have been cited, and which I have upon my paper, all combining to demonstrate, that every matters of excuse or justification must be distinctly and specially averred, *whoever* the person justifying may be, that the court may judge of their value and sufficiency; and the technical rule, that every thing is to be presumed against the Defendant in his plea, is quite consonant with good sense; because he is best acquainted with, and knows every circumstance, which can form his justification, and operate in his favor. It is therefore naturally expected, and fairly presumed, that he spreads them all, in their most favorable form, on his plea.

The arrest, then, as it stands on this plea, and appears to the court, was *illegal*.—This I pronounce without apprehension of contradiction; this must be admitted, unless

indeed, there be some peculiar rule, or privilege of pleading, appropriate to the Judges of the *King's Bench*. Then how do the Defendant's counsel seek to evade the inevitable consequences of this illegal act; namely, that the learned and respectable Defendant, shall be accountable, as all other men are, to the laws, for his conduct; and answerable to the Plaintiff, in damages for the injury which he, who must be presumed an innocent man (nothing to the contrary having been disclosed by the plea) has sustained by reason of the arrest?

Why first, and mainly, they insist, that this was a judicial act, and therefore, not questionable by action: they contend, that the act was done by the Defendant, in his judicial capacity and character, in the regular exercise of his judicial functions; and that what is so done by a Judge, although it may be wrong, cannot be the subject of an action. I admit, that what is done by a Judge judicially, in the true and proper sense of that term, cannot be the subject of an action: and if this be a judicial act, in the true sense of the word, the argument for the Defendant is conclusive; indeed, that has been conceded at the bar, by the counsel for the Plaintiff. However, arguments have been urged on the other side, labouring to establish, that, because this was the act of the Chief Justice as Chief Justice, it must be judicial. These arguments appear to me to be founded in a confusion of ideas and misapprehension of the *true* meaning of the *word*, and of the *principle*.

But before I proceed to sift them, and discuss the nature and extent of Judicial privilege; I shall advert, to another particular ground of justification, in some degree relied on, in this Case—It has been thrown out by counsel, in the course of argument, that however illegal such an arrest might be, under the Warrant of any other person; yet that the Chief Justice of the *King's Bench* has authority, as incident to his office, to command the arrest of any person, without information having been preferred before him upon oath, and without written Warrant. And one Case, that of *Throgmorton* v. *Allen*, from 1st *Hale* 585; which is also to be found in 2d *Rolle's*

Abridgment; and in *Viner*, vol. 20, p. 477, *Title trespass*, was relied upon in support of this doctrine.

The Case was simply this: An action had been brought against a Tipstaff of the Court of *King's Bench*, for an assault, and false imprisonment—He pleaded, that he was servant to the Marshall of the Court, and was bound by *custom*, to obey the verbal order of the Chief Justice; and that in compliance with such an order, the arrest had been made; some other matters were stated in the plea, which it is not now material to dwell upon. It is evident, that the officer was justified in making the arrest, in consequence of the order he received, the legality of which it was not competent to him to dispute. Now, no two defences can be more distinct, and essentially different, than the justification of him who issues the Warrant, and that of the person who is bound to obey it. It was not the province of the officer, to question the grounds of the Warrant issued by the Judge; it was his (the Tipstaffs) duty, to execute the Warrant, not to discuss its validity; and however illegal it might have been, *he* could not be responsible for that illegality, provided it had been regularly delivered to him to execute. The illegality of the Warrant rested with the Chief Justice, the person under whose authority the officer acted, and was bound to act. The Cases that have been cited at the bar upon this subject, fully establish this distinction, upon which it is unnecessary therefore to dwell longer; and the distinction appears to me to be so plain and decisive, that it might be also unnecessary to make any other observations upon the authority, or the application of the Case in question, but that the citation of the Case by Lord *Hale*, in his *Pleas of the Crown*, appears to have been considered to warrant conclusions, favourable to the doctrine insisted upon. If the purpose for which *Hale* cites it, and the inferences, or rules he expressly deduces from it, are examined, it will I think be found to have a very different, if not a quite contrary effect. He cites it for the purpose of shewing, that in the particular instance of a Warrant, or order of the Chief Justice, or one of the Judges of the Court of *King's Bench*, it is not necessary that the Warrant, or order should be in *writing*. In *general* a Warrant

of order to arrest, *must* be in writing; and in *general* none but a written warrant or order will be a justification to an officer acting under it. In this instance, (and there *may be* other exceptions to the generality of the rule,) the authority of this case has decided, that either by virtue of a particular custom, (for a custom to that effect was there alledged,) or perhaps by the general law of the land, a Warrant, or order to arrest, was a sufficient justification for the inferior officer, that it was sufficiently regular, (being sanctioned by practice) for him to act upon.

The decision was, that in that instance the Warrant (though by parol, and though it did not express the cause of the arrest) was *in its form*, a lawful Warrant, or authority *to the officer*; and therefore a sufficient justification in an action *against him*; but that surely will not authorise the inference, that admitting the Warrant to be wrong and unlawful in itself, it cannot be the subject of an action against (not the person who acts under, and is bound to obey it,) but the person, who takes upon him to issue it. That proposition may or may not be sustainable; but it certainly never can be decided by any possible inference from this case. Thus I think, I have shown that this case of *Throgmorton* v. *Allen*, rightly understood, does not sustain the plea here.

To return therefore to the main question, how far *this act can be said to be judicial in its nature, and therefore privileged*. This as I have before said, is a question of the very utmost importance; the Case is of the first impression, no Case in point has been produced on either side, in the course of this long argument; and therefore it may be presumed, that none could be produced or found. It must therefore be argued upon principle, and analogy; upon established principles, and analogies more or less close, more or less remote. And it does strike me, that there is an obvious and close analogy, between the Case of the Judges of the *King's Bench*, and that of any other Judge or Justice, cloathed with a Judicial character, when called upon to answer for an arrest of the nature here complained of.

Exemption from action for judicial errors, is every where stated *generally*—not confined to any class of Judges. It is not peculiar to Judges of the superior courts. It reaches every one called on by his station, to act or exercise any function judicially. So all the cases say—"the Judge, be he Judge of Assize, Justice of the Peace, or any other Judge." So in 12th *Coke*; and in every other place where the question has been discussed. Not confined to this class or that—to the Chief Justice, or the Puisne Judge. Not to the Judge in the superior Court of Record; nor to the sheriff in his court; nor to the Justice of the Peace at the Court of Quarter Session; but extending to all persons cloathed with a judicial character—reaching to all descriptions of men, who are authorized to hear, decide, and determine, according as their sense, their information, and their judgment shall direct them. In the cases of Judges of Assize; of sheriffs; of Justices of the Peace; in all cases where the exemption of Judges from action is noticed, the privilege is made to be comprehensive of, and co extensive with, the judicial character in the strict and legal acceptation of the term, *judicial*. And this is strongly proved and strikingly illustrated, by adverting to the mixed character of several of the persons, in cases where the question has arisen: particularly of sheriffs, in whom this mixture of character has been most frequently noticed, and by reason of which they are called upon to act, sometimes ministerially, sometimes judicially. In the former case, they are the mere ministers or instruments of some other persons; and are as such amenable to action. In the latter, they are Judges themselves; and are consequently exempt. The protection of the sheriff from action, when acting *judicially*, and the distinction are expressly recognized by *Lord Chief Justice North*, in the remarkable case of *Soames* v. *Barnadiston*. (*State Trials*, 7 vol. p. 441) That was the case of an action against a sheriff, in consequence of a precept, which had been directed to him, to return two members fit to serve in parliament. The sheriff made his return: upon which the Plaintiff complained, that it was false; and brought his action in the Court of *Common Pleas*. That court decided, that the action would lie; but the case was removed by a writ of error, to the *Exchequer* Chamber,

where the judgment was reversed; and *North*, afterwards *Lord Keeper*, in pronouncing his judgment, distinctly stated, that no action would lie: because the sheriff had been called upon to act in his capacity of Judge. He was decidedly of opinion, that in returning the members to serve in parliament, he acted judicially. In answer to the arguments which had been urged to prove, that the act had been ministerial, *Chief Justice North* said "that they "had not been sufficient to convince his judgment; on "the contrary, he decidedly thought, that the act of the "sheriff, in this instance, was altogether judicial: he had "to decide and determine; to exercise his judgment and "his understanding.—His duty was not merely, to de-"termine in whose favour the greater number of votes "appeared;" it was not, who had polled the most; or, as *Lord North* said, "it was not a mere arithmetical ques-"tion:" No! the sheriff had many other questions to decide upon. He had to decide upon the qualifications of the freeholders; he might have to determine questions of bribery; of the ineligibility of freeholders; and all the multifarious questions, which occur upon contested elections. And here, beyond a doubt, he acts *strictly judicially*. Had he indeed, omitted to make the return; had he not obeyed the writ, there an action would lie; *because, in that, his duty was ministerial*. There he would have disobeyed the mandate of a superior power, to which he acted ministerially; and he would, consequently, be open to an action. *The distinction was perfectly plain.* In naming the members, he was judicial. In making a return to *The King's* writ, he was ministerial.

But the complaint of Sir *Samuel Soame* was, that *he* was the person, whom the Sheriff *ought* to have returned. The words of the Chief Justice are remarkable, "God forbid," said he, "that we" (the superior Judges of Record) "who claim this exemption for ourselves, should "refuse to take the burden off the shoulders of others." The same distinction is applicable to Justices of the Peace. Here also we have the express language of the law, that a Justice of the Peace is amenable for a ministerial act, but not for a judicial one. The Justice of the Peace maintains this mixed character as exactly as any other officer; he is

judicial, in the strict and legal sense of the word, when sitting in the court of Quarter Session with his brother Justices, where he decides upon the great mass of business, and numerous Cases of misdemeanor, which are tried before that tribunal.—He is ministerial, when, like the antient Conservator of the Peace, whose place he supplies, he takes sureties for good behaviour, to keep the peace, or to appear at the Quarter Sessions, and answer to whatever charges may be there preferred. Here he is ministerial to the King, whose peace he preserves. In his combined character he presents that mixture, for which I contend; and, as it appears to me, with perfect analogy to that combination of the ministerial and judicial character, which exists in the judges of the *King's Bench*. Notwithstanding the greater dignity of their station, and the higher importance of their office, they too are Conservators of the Peace; and as such, they call for sureties of the Peace; and the learned and respectable Defendant, when he committed the act in Question, must have done so in his character of Conservator of the Peace, and not in his quality of Chief Justice. The Chief Justice now, as originally, maintains this mixed character; he is, at one and the same time, Conservator of the Peace and Judge.

Chief Justice *Wilmot* (who has been resorted to, and strongly relied upon, to support the case of the Defendant,) says, "that the Judges of the Court of *King's Bench* are at this day, Conservators, Coroners, and Justices of the Peace throughout the kingdom." Acting as Conservator of the Peace, the Justice of the Peace is ministerial, and therefore responsible, notwithstanding his additional Judicial authority. In the same language, on the same unalterable principles and reasoning, the Judge of the *King's Bench*, acting as Conservator of the Peace, is ministerial; and therefore responsible, notwithstanding his additional judicial authority. His high station constitutes no distinction. The Justice of the Peace has the keeping of the peace, within a certain district: he is also to sit at sessions, to try offences committed within that district. "But, for "as much as it would little avail to the correction of "offenders, to have their faults brought to light by enquiry, unless Judgment and execution be also given and

" done upon the same, therefore, was the third clause " (or *assignavimus*) in the commission added, which giveth " power to the Justices of the Peace, or unto two of them, " whereof, one must be of the select number of them, " (now commonly called of the *Quorum*, because the " commission in making that choice, beginneth with that " word) to hear and determine all the offences compre- " hended within the same; and to chastise the offenders " according to the laws and customs of the realm, and " according to the statutes, in that behalf made and or- " dained, *Lamb Ein. Cap. 9. p. 54-5.*"

The Judge of the *King's Bench* has the keeping of the Peace, throughout the kingdom; and sits in term, to try offences committed in any part of the kingdom. Here is complete analogy, and similar mixture of character and duty. In the act of issuing a warrant, such as this on the pleadings, there is no feature of judicial character, whether done by the Justice of the Peace, or of the *King's Bench*; no cause in court existing; no cause commenced thereby. The Judges of the *King's Bench* are, under the same patent, Judges of the *King's Bench*, and Justices and Conservators of the Peace. Justices of the Peace are, under the same commission, Conservators of the Peace, and Judges to decide, formerly upon felonies, now upon all misdemeanors in Quarter Sessions. But it may be said, that the analogy does not hold; for, that the Warrant in this case has been issued, to bring the Plaintiff before the Defendant, to bind him over to appear and answer in the highest criminal court, to whatever charges might be brought against him; and which charges were to be enquired into, before the Chief Justice himself, and his fellow Judges. To this however, the answer is obvious—A Justice of the Peace, being of the *Quorum*, is fully empowered under his commission, to issue his Warrant in such a case, and to bring the party before him, and bind him over to appear before himself, (such Justice of the Peace) and his fellow Justices in the court of Quarter Sessions; and to take his trial before them for the alleged offence. Here then the analogy appears complete; and if a Justice of the Peace issued such a Warrant, as this appears to be upon the face of it, against an innocent

man, (and such the court are bound to consider the Plaintiff to be, nothing to the contrary appearing before us) could it be seriously contended, that the Justice, if issuing such illegal warrant, would not be liable to action? Surely, the question could not admit of one moment's discussion. The analogy between the two characters being then, to my understanding, as close as possible, I cannot see any good reason, why the liability to action should not exist in the one instance, as it does in the other. But, perhaps it may be said, (for I wish to answer, not only every objection that has been made in argument, but those that occur to myself) that the analogy fails, because a Judge of the *King's Bench*, sitting alone, constitutes the court; but that a Justice of the *Quorum* is not the court, unless when associated with other Justices. To this I answer, that the objection is fallacious; for, by the constitution of the court of *King's Bench*, one Judge does not form the court. A single Judge may sometimes go into court, and decide upon motions of a trivial, and comparatively unimportant nature; but, that one Judge constitutes the court of *King's Bench* of himself, or can fairly be considered or said so to do, rests upon mere unsupported assertion. If not, there must be some authority for it; let it be produced, and I shall bow to it; but, in the mean time, I must rely on the constitution of the court, and the uninterrupted usage and custom of the court; and never having known or heard of a single Judge having filled the functions of the entire court for a single day, much less for a Term, I must declare my sentiment, that a single Judge, sitting alone in court, cannot be regularly said to consitute the court.

Let it even be granted, that a single Judge acting in, or *as* and *for* the court, may be said, upon certain occasions, to constitute the court; yet that will not affect the question in this case, where it is not only admitted, but contended on the part of the Defendant, that the act done, is by virtue of the authority vested in the individual Chief Justice, and in each and every individual Judge of the court of *King's Bench*, and not by virtue of an authority vested in the whole and entire court, though exercised by one, in the name and on the behalf of the

whole court. But here occurs another objection—one of more weight, and one which requires a more elaborate answer.

It has been said, that this act cannot be ministerial; for whom should it be ministerial to? A ministerial act is one of obedience to some higher authority; but is there any authority superior to that of the Chief Justice? Therefore they argue, *propter dignitatem*, no act of the Defendant can be ministerial; and say, that there is no book, case, or *dictum* deciding, that it is or can be so; and thence they infer, that he must be exempt from action, for any thing he does. To this I reply *in limine*, where is the authority in any book, text, or margin to be found, to support such a proposition? I have not been able to meet any, though I have searched with some industry—I shall be very thankful to any person, who can point it out.—It is not to be found even in Chief Justice *Wilmot* himself, whose authority seems to be appealed to, for the solution of every doubt in this case. But I would not be content, to take the law upon the authority of Chief Justice *Wilmot*; I would go a little higher—"*Melius petere fontes*, "*quam sectari rivulos*," and I ask, if I can shew, that the Judges of the Court of *King's Bench*, are Conservators of the Peace, and as such acted ministerially in earlier times, how it happens, that they cannot do so now?—

In order to establish this position, it will be necessary to go back to a very remote period.—In the *Saxon* times, antecedent to the *Norman* conquest, it is hardly necessary to say, that the county court was one of principal importance: The *Comes* or Earl presided there, assisted by the Sheriff and Bishop; and in that court were decided all matters, ecclesiastical, criminal and civil—It's decisions were subject to the reversion only of the great *Saxon* council, called the *Wittena-gemmote*. Neither the great liberty, which the people then enjoyed, of choosing their own Sheriffs and Conservators, nor the power and consequence, which these independant officers possessed, by reason of the important duties they had to perform accorded with the views of the *Norman* Conqueror. He determined to

introduce a system of *Norman* Jurisprudence, in the place of the *Saxon* institutions.

With views, not necessary here to unfold, he established the *Aula Regis*—In this court he sat in person—assisted by several great officers of state; the Earl Marshall, the Lord Treasurer, the Lord Chancellor, the Lord Steward, and one or two others who held offices which still exist. Besides these, there was an officer brought over from *Normandy*, skilled in the *Norman* law, and called the Grand Justiciary, who was, by virtue of his office, Guardian of the Realm in the King's absence; and who chiefly advised in criminal matters. The King himself presided in this Court, as the supreme Judge of it; being at the same time then, what he still is considered to be, the Grand *Conservator of the Peace* throughout the realm. "The Queen's Majesty then is, by her office and dignity "royal, the principal Conservator of the Peace within "her dominions *&c. Lamb. Ein.* 12 *Cap.* 3." And whence it is even at this day, emphatically called the "*King's* peace"!—The successors to these great officers of state, who sat in this Court, to assist the *King* with their advice, each in his own department, are at this day found to be Conservators by prescription—Whence it must be presumed, that these officers were originally invested by the *King*, (in those early times, which exceed the period of legal memory) with that portion of his regal power; and it must be equally manifest, that they were invested with it, independant of, and distinct from any judicial functions they might be supposed to exercise in the *Aula Regis*, when the duty of Conservators is considered, which is purely ministerial to the *King*, and the keeping of the peace. Their authority in this respect was different from that of the Sheriffs, who still continued to be Conservators in their several districts; for it was not confined, as his was, to a particular district, but it extended over the whole Kingdom. They issued their process for bringing any person before them, who should be found to have broken that peace, or who should appear disposed to break it. What was the process? It was a prerogative Writ of the *King*, to preserve the peace, and enforce obedience to all orders of that high tribunal—

the process of attachment, introduced and borrowed from the *Norman* laws; and this was the process of the *Aula Regis*. Why was it resorted to by them? Because the disobedience of their orders was a contempt of the *King* himself, whose ministers they were.—Their authority being in fact a delegation of that of *The King*, extended to all parts of the realm; and they issued their process against all persons who broke the peace, or were likely to break it. By the *Norman* law it was established, that nothing could be done, but by *The King's* Writ.

This practice was introduced into the *English* law; and if the person, to whom such Writ was directed, neglected to obey it, the neglect was termed a contempt of *The King's* authority; and an attachment issued, to punish the person guilty of it. And here was the true origin of attachments. It was a prerogative process, derived from a presumed contempt of *The King's* authority. This process of attachment has been brought, by a remote analogy, to bear upon the present case, by means of a *dictum* of Judge *Wilmot*, in his argument or opinion in the case of *The King* v. *Almon*—a case never decided; and an analogy without foundation. That is not an authority upon which I can rely. There Judge *Wilmot* was seeking for the origin of attachments, expressing his dissatisfaction with the account given by a man of great name in the annals of the law, Chief Baron *Gilbert*, in 2. *C. P.* he says, "that it was coeval with the constitution of the Courts, "but that he could not trace its origin." I may then be permitted, when such respected Judges differ, to express my opinion, not agreeing with either. I so far perfectly agree with *Wilmot*, that the origin of attachment was at least as old, indeed much older, than the constitution of our Courts, and beyond the time of memory. I add, that it emanated from *The King, in propriâ personâ*. It was a prerogative process,—an order to take by the body, for a contempt of the royal authority.

As a proof, that I have truly traced the origin of attachment, I shall cite the words of the antient Writ *de homine replegiando*, from the *Registrum Brevium*: "*Nisi captus est per speciale preceptum nostrum, vel*

"*capitalis Justiciarii nostri, &c. quasi secundum consuetu-*
"*dinem Angliæ non sit replegiabilis,*" evidently alluding to cases of persons attached by *The King*, or the Chief Justiciary, before the division of the Courts, for contempts, who were not replevisable or bailable: a power possessed by the Chief Justiciary, as the representative of Majesty in the *aulâ regiâ*; and afterwards, on the division of the Courts, distributed and bestowed by Statute *W. 1. Ch. 5.* upon the Justices of the several newly-constituted Courts, as is stated by *Fitzherbert, N. B.* 152, 2 *Hale's Ed.* in the passage cited by *Gilbert*, and commented upon by *Wilmot*; and accordingly, persons so committed by any of those parties for a contempt, are not at this day bailable by any other authority; being as it were, committed in execution and punishment of the contempt.

Such was the case of persons, declared by the Writ not to be replivisable; persons committed by the special command of *The King*, or the Chief Justiciary presiding in the *aulâ regiâ*, by attachment, which was the process of that Court, where its origin may be traced, and is to be found—The value of the *Registrum Brevium* as an authority, is attested by the best writers: Bishop *Nicholson* in his *Eng. Hist.* Lib. 1. Ed. 1714, p. 205-6 says, "this "very antient collection is the best evidence, that our "*English* common-law was not borrowed from the *Ro-*"*man.*" So also it is cited, as the best authority, by *Selden*, "*disputatio ad Fletam,*" *Cap.* 9, 1; also in *Bracton, Lib.* 5, p. 413; in *Fleta, Lib.* 2, *Ch.* 12. If these authorities wanted corroboration, it is amply supplied by Lord *Coke*.

The *Norman* Conqueror still pursuing the same policy, discountenanced the County Court. At length, in process of time, the Grand Justiciary became formidable to the Barons: and even to *The King* himself. He was *virtute officii*, Guardian of the Kingdom; he was the great Conservator of the Peace; he was the Interpreter and in fact, the great *Repertorium* of the law The enjoyment of those numerous dignities, the possession of this great power produced the abuse of them. Such, unfortunately is the course of human nature. He became particularly obnoxious to the Barons; the whole Kingdom was desirous

to get rid of an individual, who possessed an authority so formidable. The division of the Courts took place in the reign of *Edward the first*; but those persons who formed the *Aula Regis*, did not lose their offices of conservators of the peace by the division; and they still continue conservators of the peace by prescription. They still maintain that mixed character, which they originally had; and accordingly they act sometimes judicially, sometimes ministerially. Ministerially to whom? Ministerially to the *King*, as when formerly sitting in *Aula Regis*, in matters relating to his peace.—They still continue to issue process for bringing persons before them by the body, for disobedience to the *King's* authority.—Here then is the analogy I asserted; and to my understanding, no analogy can be more strict, more close or complete. Justice *Wilmot* has said, that he could not trace out the origin of this process of attachment; that it must be coeval with the constitution of the Courts. Had he pursued his researches higher, he might have found the origin of it, at once appropriate, and well defined.

Here it should be observed, that *Wilmot* himself recognizes the ministerial, as well as judicial character of the Judges of the Court of *King's Bench*. So does every elementary writer; and beyond all controversy, the two capacities still exist.—But, say the counsel for the Defendant, the ministerial has merged in the judicial character; the conservator is lost and drowned in the superior dignity of the Chief Justice.—This is a mere arbitrary *dictum*, founded on assertion, not on argument, not recognized by any writer upon our Law. If it be established on legal principle, there can be no difficulty in pointing out the authority upon which it rests; and where I ask, is it to be found? For my part, I clearly see the distinctness of character. So did *Wilmot*, the so much relied on *Wilmot*, who distinguishes their own proper authority, as separate and detached from that of the Court.

" In 2 *Inst.* 53 and 4 *Inst.* 81, 182, Lord *Coke* says, " it (the Writ of *Habeas Corpus*) ought to issue out of

" the Court of *King's Bench* in term time and out of " *Chancery* in either term or vacation.—All Writs, in " supposition of law, do issue in term; and he might " mean no more, than that Judges could not grant them " by their own proper authority, as separate and detach- " ed from the Court, as they issue Warrants." *Wilmot opinion on the Writ of Habeas Corpus*, p. 100. To me there is no amalgamation perceptible—no blending—none of that merging, which counsel have talked of and dwelt upon, but which I do not understand.—If I am asked, to whom the Chief Justice acted ministerially? I would answer (as before) to the *King* himself—He acted ministerially to the *King*, when he called a person before him to give security for his good behaviour; ministerially to the *King*, when he required surety for the preservation of the peace, when the *King's* peace was in danger of being broken; and from whom through the *Aula Regis*, as I have shewn, he derived the power of arrest. For this very purpose the *King's* prerogative Writ of attachment was entrusted to him, as conservator of the *King's* peace.

Another strong argument to shew the distinctness of character, is, that certain other high officers, who sat in the *Aula Regis*, continue to this hour conservators of the peace by prescription, as appears by the authority (not to mention the earlier writers,) of *Coke*, *Dalton*, *Lambard*, and *Blackstone*. The Lord Marshall, Lord Treasurer, Lord Steward, and Lord Chancellor were all conservators of the peace by prescription; and could it be contended, that if any one of those great personages were at this day to issue an illegal Warrant, and command a person to be arrested without reasonable Cause, he would not be amenable in an action?—Take the Lord *Chancellor* for instance; for, in a case so extraordinary as the present, I have a right to imagine any thing, however improbable or wild. Suppose the Lord *Chancellor* should issue his Warrant, and cause an arrest, of such a description as the present appears on the record, to be made, would he not be amenable in an action to the injured party? Surely he would: even though he were to say, (as the Defendant here) that he did it *virtute officii*. What then becomes of the argument *propter dignitatem*? The *Lord Chancellor*

fills an high office indeed—he is a judicial character, and an elevated one—he is the head of the law—a Judge in the highest station; still, notwithstanding all this, if he had acted in the manner described, and by his own Counsel imputed to the Defendant, his act would have been ministerial—ministerial to *The King*, in a matter relating to his peace.

I again ask now, what becomes of the argument, *propter dignitatem?* What becomes of the merging doctrine? What now becomes of the argument, that the act was not ministerial? If I have not deceived myself, they are completely overthrown! I have said, that this case could be argued only from analogies, more or less close, more or less remote. Suppose then, that the Defendant had thought proper to bind over the Plaintiff, if resident in a distant County, to appear there (for his jurisdiction, as Conservator of the Peace, extends all over the Kingdom) to answer at a Commission of *Oyer* and *Terminer*, or at the Court of Quarter Sessions, to such charges as should be then and there brought against him. Surely, if he had acted so (and he might have so acted) it is no strained inference to say, that this act would be ministerial; not to the Court of *Oyer* and *Terminer*; nor to the Court of Quarter Sessions; but to *The King* himself, in a matter relating to the preservation of the peace. What essential difference does it effect in the act, that the party was bound to appear in the *King's Bench?* Here again the analogy appears strict and obvious. When the Justice of the Peace binds for such appearance, he is there strictly and confessedly ministerial; when he sits at the Court of Quarter Sessions, he is as strictly and as plainly judicial. When the respectable Defendant issued the Warrant in question, he must be presumed to have acted as Conservator; and acting as Conservator, he is ministerial—ministerial to *The King* himself; and being ministerial, he is, as the Justice of Peace is, amenable in an action to the injured party, for his misconduct. It makes no solid difference, that he is created Chief Justice of the *King's Bench* by letters patent, with all the privileges attached to that high office; and that he is by such letters patent, constituted Conservator of the Peace; and at the same

time becomes Chief Justice and Conservator, under one authority. The Justice of the Peace does likewise (as I have said) exercise his judicial and ministerial functions, under one and the same commission.

But it has been said, this act was judicial: for it is according to the Course and practice of the Court, for Judges to issue warrants to apprehend in cases of misdemeanors, on complaint laid before them. Without dwelling on the value of the argument, which would not prove, that it was not done in the capacity of Conservator, I deny its foundation. I deny, that it is the course or practice of the Court. I do so on principle—on the authority both of the Common and Statute law; and on the reports of the course of proceeding of the Courts in *England* and in *Ireland*. For I have had enquiry made in the offices; and called for precedents of such warrants, if any such could be found; and I have not been furnished with any. Mr. *Bourne* of the *King's Bench* office in *Ireland*, has supplied me with some instances, where warrants have been issued by Judges of the *King's Bench*, to compel the parties to give security, in matters of seditious libel and challenge to fight. These were clearly issued in their capacity of Conservators of the peace, to preserve the peace. He has furnished me with no other instance of a warrant to arrest a party for an alleged misdemeanor, before indictment found. From *England* it has been reported to me, that it never was the practice, for a Judge at Chambers to grant a warrant for an arrest in any criminal case, before certificate of an information filed or indictment found.*

* In *Hand's practice on the Crown side of the Court of King's Bench*, the writer, treating of the business of Judges at their Chambers, speaks *(inter alia)* of the *granting of Warrants for the Apprehension of offenders, on Certificates of Bills of Indictment having been found against them; or of their having been Convicted, on Indictments or informations*, and their not being under any recognizances to appear; or of their having been Outlawed &c. See also Lord *Ellenborough's* Observation in *Delany* v. *Stubbs Sitt. after H.* 1813, when applied to, to commit a person for forgery,—" I have maturely weighed this subject;

And the *English* practice is certainly most consonant to the spirit and principle of our laws and constitution. Anciently, even after information filed or indictment found, the first process in cases of misdemeanor was "Summons;" and, if the party appeared, no *capias* issued; but there is no instance whatsoever of an arrest for an offence under felony, *before information or indictment found.* It was utterly illegal. So all the authorities from the eldest to the latest; so held and laid down by *Coke* and *Hale.* Latterly indeed, upon actual breaches of the peace, Justices of the peace have sometimes interfered, as Conservators of the peace, to preserve it; and bound the party to be of his good behaviour; and also to appear at Sessions or in the *King's Bench*, as the case might be. I say they interfere, as Conservators of the peace, to preserve it; and merely as such. So Lord *Coke* lays it down, and he expressly denies, that they have in themselves authority to grant a warrant to apprehend, before indictment; and his reasoning in 4th *Inst.* 174, 177. in support of his opinion, that a Justice of peace could not grant a warrant to apprehend an offender, before presentment made or indictment found, affords a strong light to discover how the practice grew up, of a single Justice issuing such warrants; Lord *Coke* says, that "a "Justice of the peace cannot make a warrant to take a "man for felony, before indictment; nor even after, unless "in open court of Sessions of the peace;" and with reason, for this warrant is in the nature of a *capias* for felony, which cannot be granted before indictment; nor after indictment, unless "in open court; because," says he, "Justices of peace are Judges of record; and ought not "to proceed upon a surmise, but upon record;" and in support of this opinion, he quotes the resolution of the court of *Bridewell*, *Brook*, and *Fitzherbert*, in 4 *Hen.* 8. fo. 16; and he says, "a Justice himself cannot arrest one

"and I have resolved, that I never will, except in an ex-"treme Case, Commit any man merely upon examinations. I "know too, that good and learned Judges, not now alive, have "declared, that they would not *in any Case* Commit *merely on* "*examinations.*"

" for felony, unless he himself suspect him, (as any other " may) and for that same reason he cannot make a war- " rant to another;" and he refers to the Book of Assize, 42 & 12. and 24 *Edward* 3; and observing on the 1 & 2 *Philip* and *Mary c.* 1. and 2; and 3 *Philip* and *Mary c.* 10. which corresponds with our 10 *Car.* 1. he adds, " that since these Statutes, if any person be charged with " any manner of felony, and information be given to any " justice of peace of the felony or suspicion thereof, " and fear that the King's peace may be broken in appre- " hending him, the Justice may make a Warrant to the " Constable *to see the King's peace kept*, in apprehending " the party charged with or suspected of the felony, and " bring him before him; and the party that giveth the " information of his knowledge or suspicion to be present, " to arrest the delinquent; and this (he states) agrees with " common use and observance; and also with the 14th *H.* " 8th, that a Justice of the Peace may make his War- " rant, for the salvation of the Peace, meaning to assist " the party that knows or suspects the felony"—Thus the arrest according to him, is made by the party suspect- ing; and the Constable attends with the Warrant, to pre- vent the Peace from being broken—it is the arrest of the party, who, as he adds, cannot break the house to come at the person, as after indictment found the Sheriff, by virtue of the King's Writ, may.—

It is clear then, that the power to issue the Warrant belonged to the Justice, not by virtue of his judicial cha- racter as a Judge of record, seeing that no *capias* or Warrant to apprehend, which is in the nature of a *capias*, could issue, till after indictment (as is laid down in that case of 14*th* of *Henry* 8*th*, 16. in these words " a Justice " of Peace cannot make a Warrant to take one for felo- " ny, if he had not been indicted before") but as a Con- servator of the Peace, to assist the party suspecting, by preserving the Peace on the occasion. In process of time they have encroached, and enlarged the author- ity they had been in the habit of exercising, as Conser- vators of the Peace; and from making Warrants to the Constable to preserve the peace, when arrests were made

by the person suspecting, they came to issue the Warrant to arrest; but still the authority is derived from the character of Conservator of the Peace, and not of Judge of Record, who can only act on Record, not on surmise; and accordingly in doing so, they act at their peril; and must state to the Court, on Action brought, the grounds of their justification, distinctly and with precision.

The whole court itself could not, nor cannot issue a warrant or *capias* in any case, till after indictment or information; nay further, not in cases of trespass or misdemeanor merely, even after indictment found, till after summons or *venire* disregarded, (I mean at common law. I will advert to the Statute by and by).

I say no court can arrest or issue a *capias* on indictment found, for any trespass; and the authorities are so. *Fitz. Abridgment, title Assize*, 17. "in trespass before the "Justices of *Oyer* and *Terminer*, the *first process* shall "be a *venire facias*." He cites 32. *Hen.* 8, *pl.* 10. which I have looked into, and find to be accordingly. The same point is laid down in the same abridgment, *Tit. Process, pl.* 188, with which agrees *Finch*, 355; "in all trespasses, "whether it be a writ of deceit or trespass *vi et armis*; "or though it be a writ from *The King* himself, upon a "contempt or breach of the peace, it is attachment; and "if a *capias* in these cases go out first, and the party be "taken thereby, he shall be dismissed: because it should "be by pledges, distress infinite, and upon a *nihil* re-"turned, a *capias* as before."

Again, in 29, *Edw.* 3, *pl.* 18. the prior of *H.* brought a writ on the statute of labourers against certain servants. Process was continued, till a *capias* issued—the sheriff returned, that they had been taken and rescued; whereon an *exigent* was prayed against them, and a *capias* against the rescuers; but by the court both were refused; and an *alias capias* was granted against them, and a *venire facias* only against the rescuers. That was a strong case. The rescuers had been guilty of a contempt of the court, or were so charged by the return; and yet the court would not grant a *capias* in the first instance—Again in 12 *Co.*

rep. 131. The case of oath before justices, it was resolved by all the Justices of *England*, "that the process upon Indictment for recusancy is *venire facias, capias*, &c. which is the process in indictment of trespass."

There is indeed one authority, of a *capias* being the first process upon an indictment for a misdemeanor in *Rastell* 263—but that was a proceeding under a Statute, the 2 *H. 5th* c. 7. against *Lollards*, which enacted, "that if any persons be indicted of any points aforesaid, "the Justices shall have power to award a *capias* against "them; and the Sheriff shall be bound to arrest them."—This then was by the express provision of the Statute, and "*exceptio probat regulam.*"

In 2 *Hale* 194 'tis laid down, "in an Indictment of Trespass, the process is *venire fa*, and when *non est inventus* is returned, *capias et exigent*;" and *Hawkins* says, he cannot find any express authority or precedent, to justify the making either a *pone per vadios*, or a *capias*, the first process on any indictment under the degree of *Mayhem* or Felony, except only when such process is expressly given by some statute. From these authorities it is manifest, that if an Indictment had been found against Mr. *Taaffe* for this offence, that the whole court of *King's Bench* had not authority to arrest or imprison him, in the first instance; but he must have been summoned by *Venire facias*, to take his trial; and if he had thereon appeared, he could not even be held to bail, as Lord Chief Justice *North* says in 1 *Mod.* 236: "the reason of bail is upon a supposition "of law, that the Defendant flies the judgment of the law; "and this supposition is grounded upon his not appear-"ing at first: for if he appears upon the summons, no bail "is required; for the liberty of a man is highly valued "in the law; and no man ought to be abridged of it, "without some default in him."

The Judges of the *King's Bench*, in the same capacity of Conservators, might certainly interfere in the same manner: though it is, I must say, most unusual for them so to do. And if they do so interfere, it must be at the

same peril, as it is in the same character. It is not as Judges;—it is not in a judicial capacity;—it is not in the course and practice of the business of the court. It never was the course and practice of the court to listen to charges, until solemnly laid before it by indictment or information; or to issue warrants on affidavit, till after indictment or information on their records.

Thus have I gone through the authorities at common law, I will now consider a very late act of parliament on this subject. The Act of the 48th of *The King, Cap.* 58. entitled "An act for *amending* the law, with regard to "the course of proceedings on indictments and informa-"tions in the Court of *King's Bench*, in certain cases." In the preamble reciting, that certain provisions made by former acts in revenue cases had been found beneficial, and that it was expedient to *extend* them to other cases, it *enacts*, (not declares) "that, whenever any person shall "be charged with any offence, for which he or she may "be prosecuted by indictment or information in his "*Majesty's* Court of *King's Bench*, not being treason or "felony, and the same shall be made to appear to any "Judge of the same court by affidavit, or by certificate "of an indictment or information being filed against such "person in the said court, for such offence, it shall and "may be lawful for such Judge to issue his warrant "under his hand and seal, and thereby to cause such "person to be apprehended and brought before him, or "some other Judge of the same court, *or before some one "of his Majesty's Justices of the peace*, in order to his or "her being bound to *The King's Majesty*, with two suf-"ficient sureties, in such sum as in the said war-"rants shall be expressed, with condition to appear in "the said court at the time mentioned in such warrant, "and to answer to all and singular indictments or informa-"tions, for any such offence."

The argument drawn, and I think fairly drawn from this statute has been slurred over, perhaps wisely, by the Counsel for the Defendant. They seem to have felt and avoided the difficulty. It was indeed thrown out, that *this* was not one of the provisions before found beneficial

in revenue cases, and by this act extended generally—that the amendments are contained in the subsequent clauses respecting appearance *&c. &c.* Matters difficult of proof, are sometimes very easy of assertion; and the Gentlemen have put forward this position merely on their assertion. They have not deigned an observation in reply to those made upon the enacting character of the whole Statute; upon the general introductory words of the preamble,—upon the title of the act,—upon the word "*extend*".—These arguments I do not intend to repeat: but I have looked into the Statute itself, to ascertain from itself, if possible, what the provisions are; and I have found them. The act begins thus.—"Whereas the provisions contained in two acts of the 26th and 35th of the *King*, for "amending the law with regard to the course of proceeding on Indictments and informations in cases relating "to the revenue, have been found beneficial, and it is "expedient to *extend* them to other cases, be it *&c. &c.*" I have further looked into the acts cited; the *26th Geo.* III. *Cap.* 77 & *35th Cap.* 26.—And I find the only provision, amending the law with regard to the course of proceeding on Indictments and Informations in cases relating to the Revenue, contained in the *18th Sect.* of the act of the *26th*. The preamble of this *Section* recites; that persons guilty of certain offences, being prosecuted for the same by Indictment on Information in *King's Bench* do frequently escape punishment, by reason that such persons have not been usually put under any recognizance to answer such Indictments; unless in cases where some specific pecuniary penalty is imposed, or where the offence having been committed in *Middlesex*, an Indictment for the same has been originally found in *King's Bench*; and for remedy whereof the act goes on, making the precise provision which is copied into and followed by this act of the *48th*; and no other of the provisions of the *48th* is to be found in the act of the *26th*; but they appear in that of the *35th*. Where now is the assertion, that this is not one of the translated provisions?

The Statute 48 *Geo.* III. professes to adopt a provision from the Statute *26th*, as an amendment; and to *extend* it to other cases. This is the only provision, to be found in both acts—Can argument be necessary to prove further,

that this provision *is* the amendment found beneficial in operation, under that act; and now for the first time *extended* to other cases! Then, here is a Statute *enacting*, not *declaratory*; conferring the restricted authority described; thereby evincing, that it did *not* exist, and could *not* have been possessed before.

It was said at the Bar, that the purpose of this act was merely to enable the Judge, in misdemeanor cases, to hold to bail in a sum certain. Of what use, or for what purpose was this authority conferred; if the Judges of the *King's Bench*, and any Justice of the peace had the power, before its existence, to arrest and hold to bail, for any sum at their discretion, mentioned or not mentioned in the Warrant—in all misdemeanor cases,—in all cases not being felony or treason—if they, (the Judges) had this power to exercise, not only on complaint by affidavit, but without any complaint; for the argument here is, that the Chief Justice could arrest *ex mero motu*, whenever he thought proper to arrest, "*sic volo, sic Jubeo.*" The proposition is monstrous—There is no authority to sustain it,—at least none has been produced.

The only authority I can find tending that way, is a passage, to which, if it were more decisive than it is, I am not disposed to sacrifice the authorities of Lord *Coke*, and those other respectable names I have cited. The passage is in 2 *Hawk.* 135; "it *seems probable*, that the practice "of Justices of the Peace in relation to this matter also, "is now become law; and that any Justice of the Peace "may justify the granting of a Warrant for the arrest "of any person upon strong grounds of suspicion for a "felony *or other misdemeanor*, before Indictment has "been found against him—and he adds, (distrusting his "own opinion.) Yet inasmuch as Justices of the Peace "claim this power rather by connivance, than any ex- "press Warrant of law, it is a safe way of proceeding "for him who has the suspicion, to make the arrest in "his proper person, and to get a Warrant from the "Justice of the Peace to the Constable, to keep the "peace."—Justifying the view, I before took from Lord *Coke's* observations,—and evincing strong distrust of his

own inference, when he contradicts me. But further, this doubtful opinion or inference of his is not sustained or justified by any one of the authorities which he has placed in the margin of his book, and which I have consulted. *Hale* confines himself expressly to felonies, and does not say a word in the passage referred to, of *other misdemeanors*; on the contrary, in the very first page of the 2d. vol. of his work, he says, "the method, order and "rules of proceeding in capital cases is different from "any other course of proceeding in criminal cases, and "has an appropriate method of proceeding by law con-"signed to it, and therefore fit to be handled together."

Blackstone also confines his observations to Felonies. 14 *Hen.* 8, is as I have already shewn, directly against his inference; and the solitary reference on which his doubt can be suspended, is that of 6 *Mod.* 179; and what respect is due to that I shall now consider. The case is *The Queen* v. *Tracy*, s. c. 6 *Mod.* 169. It was an indictment, for that *Tracy* with others intending to oppress one *Muriell*, got him arrested under a warrant from the Recorder, wherein *Muriell* was charged by the oath of one *Ashley*, to have assaulted the said *Ashley* on the highway, with intent to rob and murder him; and brought him before *Chamberlain* a Justice of the Peace; and persuaded *Chamberlain* not to bail him, and extorted, &c. There were various objections taken to the indictment. "But *per curiam*, if "a man gets another wrongfully put in jail, and then the "keeper extorts from him, he that wrongfully put him "in, is guilty of the oppression of taking the money. If "a man falsely imprisons *I. S.* and the jailor detain him "till he pays so much money, he shall have his action "of false imprisonment, and taking so much money from "him, against such person: So here though the warrant "be legal, yet if one, with intent to oppress a man, "get him taken up by this warrant, and follow him to a "Justice of Peace to hinder his being bailed, it is illegal; "for it is illegal to use a lawful means for oppression. It "is an offence in a Justice of Peace to refuse bail for a "*common misdemeanor*; and it suffices to say in the in-"dictment, that sufficient bail was tendered; without "saying, that the party knew them to be sufficient. Here

" it was said, that *Tracy* did persuade *Chamberlain* to " commit him, and that he did commit him, without " saying, that it was *super inde*; and held well." So far " the judgment of the court. Then follows: " And *per* " *Holt*, if one be taken by process from Sessions to " the Sheriff, he must give a bail bond, according to the " statute of *Hen.* 6." (which is contradicted expressly by " the case of *Bengough* v. *Rossiter*, in 4 *T. R.* 505.)

" And whenever one may be taken by the warrant of " one Justice of Peace, one Justice may bail. Formerly " indeed, none could be taken up for a mere misdemea- " nor, till indictment found; but now the practice over " all *England* is otherwise. And *per Hale*, that practice " is become a law, and Justices of Peace *eo ipso* may bind " to the peace and over to sessions, for any breach of " peace, before indictment found."

Thus it appears, that the case itself and the judgment of the court have no bearing upon the matter in question, for which it is referred to by *Hawkins*. What credit is due then to these *obiter dicta*, which a reporter has thought fit to annex to it? A late editor of these reports (*Leach*) observing the irrelevancy of these *dicta* to that case, was satisfied, that they could not belong to it; but determined, I suppose, not to lessen the matter of his book, has published them as a distinct and separate case, which he has entitled " anonymous," in which he represents *Holt* to state what is clearly not law; and *Hale* to state what follows his name, who had long before died; and in whose work not only nothing can be found to support this doctrine, but many passages tending directly to evince his disapprobation of it. For my part, I cannot acknowledge, as valid authority to which my judgment must defer, these unauthenticated *dicta*, not of the venerable Judges whose names they assume, but of the uncertain editor of doubtful reports; nor can I adopt the (it seems) unsupported inference of Serjeant *Hawkins*—an inference, as I have proved, not deducible from or sustained by any sound authority adduced by him to satisfy me, that every Justice of the Peace may arrest before indictment, in cases where no court can arrest, even after indictment found.

I do therefore feel myself quite warranted in saying, that this act of the Chief Justice, as it is stated on the Record, was not according to the course of the Court,—that it was a ministerial act; and that he cannot shelter himself by this plea from the consequences of this illegal act, committed against one of his Majesty's subjects. It is against common right—against the first principles of the law and the Constitution. There is no distinction between Judges—No separation of superior from inferior Judges—No such thing glanced at by Lord *Coke*—by any reports—by any elementary writer. This act was a ministerial act—it is against common right—and it is not protected by the Judicial character of him who commanded it.

But suppose I have failed to prove this to be a ministerial act, that does not conclude me—Though it be not ministerial, it does not therefore follow, that it is Judicial; and upon this I found a second branch of argument, and say, that this is not a Judicial act, in the true and legitimate sense of the word. To say, that being the act of a Judge, it is *therefore* Judicial, is a sophism, or it has no meaning. I dwell not upon the objection, that this act was not done in Court. I do not want to narrow the meaning, which the law gives to the term "Judicial"—I give all fair latitude to the discussion; and I concede a great deal, that acts done in Chamber may claim, and have the Judicial character and exemption; acts done, though out of Court, by reason of a portion of Judicial authority delegated to the separate Judges in Chambers—Acts which are subject to the correction and ratification of the Court; which, when confirmed, would be and were deemed acts of the Court itself.

But is this, as pleaded, such an act?—The plea is destitute of any statement, that can enable the Court to see, whether this act was done in the regular course of a Judicial proceeding, emanating from the Court, which delegated a portion of its functions to an individual Judge. Here is nothing but a naked arrest: no fact advanced to guide us to an inference, that it was an act within the cognizance of the Court at all—Can we say, that this

Warrant was subject to the revision and allowance, or disallowance correction or confirmation of the Court? Surely we cannot. Let it be kept in mind, that this is the plea of the Chief Justice, not of the Officer, on the validity of which we must decide; and on the facts disclosed in the pleadings we are to say, whether it was done in a course of Judicial proceeding or not—It has been said and argued, that the Demurrer admits it to be a Judicial act, done by the Defendant as Chief Justice; and that an issue should have been joined on this matter, whether it was so or not. This is a strange assertion indeed. I deny it utterly—Is the extent of the Chief Justice's authority, or the legality of his Warrant, a question of fact for a Jury? 'Tis absurd to say that it is; or that the question is admitted by the Demurrer, which (as every one, who knows what a Demurrer is, must know) admits nothing but what is well pleaded. Well then! Is this a Judicial act of the Chief Justice? What do the Cases say on this matter? What constitutes a Judicial act? Is this that sort of act, which is declared by them entitled to exemption and immunity—All the reasoning in the case of the *College of Physicians*, in Lord *Raymond*, *Salkeld*, *and Comyns*—*The Case of Conspiracy* (*Floyd* v. *Barker*) 12 *co.* 23.—The reasoning of *North* in the case of *Some* and *Barnardiston*,—*Powel's* argument in the case of *Gwinne* v. *Poole and others*, 2 *Lutwyche* 1560. (*Powell* who goes as far as any man for Judicial privilege)—All go to shew, that the protection is co-extensive with the *Judicial character*; but confined and limited to a Judicial proceeding.

No distinction is taken between superior and inferior Judges, in 12 *Coke*, *Floyd* v. *Barker*;—*the doctrine* is laid down expressly, and the reasoning in this case is valuable, because it is general; as is usually the case in that wonderful mine of legal knowledge, Lord *Coke's Reports*. It is there said, "The Judge, *be he Judge of Assize*, *Justice of Peace*, *or any other Judge*," (here is no exemption, *propter dignitatem*,) "being Judge by commission "and of Record, and sworn to do Justice, cannot be "charged for conspiracy, for that which he did openly "in Court: but if he conspires out of court, this is *extra*

" *judicial*: but *due examination of causes out of court*, and " inquiring by testimony, *et similia*, is not any conspiracy: " FOR THIS HE OUGHT TO DO."

The Law upon the subject seems to me to be marked out with great precision in this passage; and I know of no authority or authentic *dictum*, that can be stated, as contravening any thing there laid down.

Upon that passage I make the following observations. It is evident, that when it is said, that a Judge shall not be charged *for conspiracy* for what he does openly in Court, but if he conspire out of Court, that is EXTRA JUDICIAL— I say it is evident, that " conspiracy" in this passage is *instantial* only; and that acts done in Court and therefore Judicial, are intended to be here contrasted, with acts done out of Court, and which therefore are considered as *generally*, extra-judicial.

The doctrine is in this passage instanced by a particular action or form of proceeding; namely, a Writ of conspiracy. But that it is general (as to a Judge being answerable or not answerable, for what he does as Judge) is manifest, from the reason of the thing, and the grounds stated for the doctrine as so laid down viz. " The " reason and cause why a Judge, for any thing done " by him *as Judge*, by the authority which the *King* hath " committed to him, and as sitting in the seat of the *King* " (concerning his Justice) shall not be *drawn in question* " before any other Judge, except before the *King* himself, is for this: the *King* himself is to deliver Justice " to all his subjects; and for this, that he cannot do it " himself to all persons, he delegates his power to his " Judges, who have the custody and guard of the *King's* " oath."

From this it is clear, that the doctrine is not applied or meant to be applicable to drawing a Judge in *question*, in any action or Writ of conspiracy only; but extends to drawing him in question, in any other action or form of proceeding whatsoever.

" It is further *clear* from another case, which is put of " a Justice of Peace recording a force upon a view, which " he did as a Judge of record, and a bill was exhibited " in the Star-chamber, for that he falsely made a record; " and it was the opinion of the Chief Justices, that " thing which a Judge doth as a Judge of record ought " not to be drawn in question, in that court."

The doctrine being thus general, then what is it, for which a Judge is not questionable? It is this:—First a Judge of record shall not be drawn in question for what he does openly in court, or in *a regular course of judicial proceeding*; but for what he does extra-judicially, that is out of court, and not in a regular course of judicial proceeding, he may be called in question.

Having made this marked distinction between acts done in court, and acts done out of court;—the distinction is guarded from the possible supposition, that acts done out of court, if in the exercise of duty, may be considered a *conspiracy*; and therefore, the distinction being first made between judicial and extra-judicial acts (the first as done in court, the second out of court,) it is added, that the due examination of causes out of court, and inquiring by testimony, *et similia*, is not any *conspiracy*; for this he ought to do; and certainly such acts, whether done in or out of court, whether judicial or extra-judicial, are not *a conspiracy*. It might even be further granted, that the sense of this passage may be extended to convey the meaning, that the acts here mentioned may be considered as judicial acts, done out of court; but if so, it must be confined to what alone can intelligibly convey to the mind, the idea of a judicial course of proceeding.

I apprehend, that it cannot be contended, that the imprisoning of a man without any probable cause, without the knowledge or suspicion, either by view or information, of any offence committed, is a thing *that ought to be done* even by a Judge, or that it is, or can be any part of judicial duty, or that it can be considered as done in a course of judicial proceeding. It must be admitted to

be *wrong*; whether wrong in the same degree as conspiring, is not material: *it is wrong*; as much a wrong in *specie* as *conspiring*; therefore, such an act cannot be considered as one of "the *similia*, to a due *examination*, and inquiring by testimony," which a Judge in certain instances ought to do; and consequently *may do* out of court.

I apprehend further, that what a Judge takes upon himself to do, *out of court*, "*Ex mero motu*," *must* be *extra-judicial*. I cannot at least conceive or imagine an instance, in which it can be otherwise. A Judge may have his judicial functions called into action, in certain cases, by his own view; he may have them called into action, by the complaint or information of others; but *without grounds for his acting*, either upon his own view, upon indictment, or presentment, or upon some complaint or information laid before him, I cannot conceive, how his acting can be other than *extra judicial*. I know nothing that is more properly and emphatically "extra-judicial," than that is. Lord Chief Justice *Coke* has, I think, clearly shewn what acts are exempt from action, whether they be done in court or out of court; and the conclusion, that this act of the Chief Justice subjects him to an action, flows from those premises, as clearly and as closely as it is possible to conceive.

The fact disclosed on the plea is, this: The illegal commitment of one of *The King's* subjects. The question then arises: Does this act come within the boundaries of that judicial exemption, as described by Lord *Coke?* And I now ask, is the arrest of an innocent man, (for the court has nothing before them, by which they can be justified in presuming him guilty) of a man not even accused or suspected, (for the court has no averment before them, either of suspicion or accusation) comprized among the number of those acts, that are "fit and necessary" to be done by a Judge? or, to use the words of Lord *Coke*, "upon a due examination of causes?" Does that come within "the enquiring by testimony?" Is it one of the "*similia*" to those due and orderly modes of proceeding? By what mode of reasoning is this to be

supported? By what system of logic is the position to be maintained, that the issuing of a process confessedly illegal, is according to the course and practice of the Court? If such reasoning be allowed, this monstrous absurdity will inevitably follow, that the course of the Court is a course of illegality—an habitual system of violating the Law, and outraging the personal liberties of the people.

No lawyer—no man of common understanding will contend for such a principle; and although I hold Lord *Coke*, his recondite learning, his great ability, and his extensive legal information in the highest veneration, still it is not upon his authority alone that I rest: but it is upon the doctrine laid down by him, and acknowledged and accepted by the Bar and the Bench, from the period at which he wrote, to the present hour; a length of time sufficient to have every proposition fully and completely investigated, the arguments canvassed; and during which the few mistakes of that great man have been detected, commented upon, and explained.—I say, it is not upon his authority, great and respectable as it confessedly is, that I am satisfied to rest my judgment; but upon the acceptance and approval of those principles, which he has laid down, by the whole Bench and Bar, which have come after him. They all acknowledge the limitations of Judicial acts, to be, as he has pointed out; and where (I wish to know) is the authority, in book, text, or margin, which controverts those principles? The cases of *Bushell* v. *Howell*, *in* 1*st and* 2*d Mod.* cited for the Defendant, support this reasoning; and I ask, what would be more reasonable or more natural to suppose, than that either the Bar or the Bench, or both would have long since cavilled at the generality of Lord *Coke's* phraseology, if his reasoning in that case had been irrelevant or unmeaning. No such thing; on the contrary, it is recognized and adopted. The writ of conspiracy was only the subject matter before the Court; but the reasoning applied to every species of wrong;—and will it be contended, that the Arrest of one man by another, out of his mere caprice and fancy, is not a wrong of as great a magnitude, as conspiracy? I therefore feel myself called upon emphatically, to say, that, from what appears upon the face

of the plea, this conclusion must follow from the reasoning of the law; namely, "that the act of the respectable "and learned Defendant here complained of, is extra-"judicial; and that he must be consequently amenable "in an action." Therefore, if I have not before sufficiently established, that the act was *ministerial*, in the strict sense of that word; yet, putting that point out of the question entirely, I rely upon it, that it has not been, and cannot be shewn, to be Judicial: but, on the contrary, that as stated upon the Record, it appears to be *extra-Judicial*.

But, in addition to what I have already said upon this head, I would again resort to the authority of Lord *Coke*. What says he? In *4th Institute* 73, we find him declaring, that the Judges of the *King's Bench*, as individuals, are Coroners and Conservators of the peace throughout the Kingdom.—As a Court, they have authority to hold pleas of the Crown. Here then is the fact of their being Coroners established by *Coke*. But it may be said, that this had no bearing upon the present case; for who ever heard of the Chief Justice of the *King's Bench* acting in the capacity of Coroner; (and by the by, Lord *Ellenborough* acted as Coroner on Mr. *Perceval's* Inquest,) but to this objection the answer is ready. Who, I beg leave to ask, has ever seen a Chief Justice of the *King's Bench* issue such a Warrant? *Coke* said distinctly, that they were Justices of the Peace throughout the Realm. What then becomes of the alleged union of character? Of the merger of ministerial in the Judicial capacity? But, great as is the acknowledged authority of *Coke*, I will not rest this part of the argument solely upon it. No! I will resort to that of another, that seems to me to have very considerable influence indeed, in the decision of the present case; I mean Chief Justice *Wilmot*—And here let me not be accused of vacillation or unsteadiness, in citing *Wilmot* in support of my own opinion, and denying his authority against that opinion. I have no such intention. But those, who rely upon *Wilmot*, in forming certain opinions, ought at least to allow him equal weight, when he is decidedly opposed to these opinions. And although I am now about to quote *Wilmot*, for the purpose of

shewing, that his opinion went to favor the Demurrer in one instance, though it might be against it in another, still I think it but fair, to state broadly and unequivocally, that in a case like this now before the Court, one which involves the first principles of Law and of Justice, I will not be bound by the *dictum* of Lord Chief Justice *Wilmot*, however high the respect may be, which I entertain for his memory.

Chief Justice *Wilmot* has asserted, in his opinion delivered to the House of Lords, on the *Habeas Corpus* Bill, that "Writs issue out of the Court of *Chancery*, "and out of the other Courts, during Term time; and "the Judges issue them after Term, not as they issue "Warrants, *in their individual characters.*" Now what can be stronger than these words of *Wilmot* himself, upon whose authority it is intended to over rule this Demurrer? Can any words more strongly apply to the present case than these? And can any possible inference be drawn from them, which is not unfavourable to the Defendant? Here, then, is *Wilmot* opposed to *Wilmot*, beyond any possibility of agreement. I therefore conclude this branch of the argument, by once more emphatically declaring, that this was, in my opinion, an *extra judicial* act; and, if extra-judicial, it necessarily follows, that whoever so acted *to* the injury of another, must be amenable to the Laws.

Further, it has been argued, that the act was Judicial, because done by a Judge of the *King's Bench*, who has a Jurisdiction, which the other Judges have not. And the argument has been pushed to this length, assuming for that reason, that because he did not act ministerially, he must have acted judicially.

That the act may be contra-distinguished from the common notion of ministerial, may be true; and yet this will not affect the present question. If a Justice of the peace, being a Judge of Record, causes a man to be apprehended, for the purpose of giving sureties for the peace, by virtue of a '*supplicavit*' out of *Chancery*, he acts ministerially.

If he does so *proprio jure*, he may be said, in some sense, to act ministerially; but in one sense of the word, judicially, as acting upon his own judgment and authority; yet, if he apprehend a man without any writ or mandate, and *proprio jure*, but without any grounds either upon his own view or the information of others, his not acting ministerially, in the assumed notion of it, does not protect him. The Question will be, not whether he acted *ministerially*; but whether he acted judicially, in its true sense, or not? Whether it is shewn, by any sufficient averment, to have been judicial, in that sense of the term, which is necessary to justify the act upon *that* ground. The argument, that the act, as having been done as a Judge of the *King's Bench*, is therefore judicial within the exemption, is maintained on the authority of two cases, (*Throgmorton* and *Allen*, and *The King* v. *White*,) and two *dicta* of *Wilmot*. I have already discussed *Throgmorton* and *Allen*, and shewn, that it has no bearing on the question now before us.

Ante p. 109-10-11.

The next case that has been relied upon, is that of *The King* v. *White*, Cases *Temp. Hardw.* 42; and, if I were disposed to be captious in respect of authorities, I might well question the authority of this Book. It was of little weight, when I came to the Bar—seldom quoted, and less relied upon. At length, however, it was adopted in these courts, as the supposed production of a great man then on the Bench; and *propter dignitatem* received with respect. It is nothing but a mere loose note, and as such, surely cannot be authority to decide our opinion here; but, allowing it for a moment all the weight that can be required, still it will be found irrelevant to the matter before the court. It was a motion for an attachment against a certain constable of the town of *Scarborough*, who had disobeyed the warrant of the Chief Justice, to arrest for felony. The constable was a mere officer, and had no right to dispute the authority of the warrant. His business was only to obey. His disobedience was a contempt; and, as such, it was right to attach him for it. But the conclusion attempted to be drawn is, that the court would not attach him, unless it were a contempt of the court; and, if it were a contempt, the issuing of

the warrant, although the act of a single Judge out of court, was a judicial one. This conclusion I deny. Such a conclusion does not at all follow from the premises. The words of Judge *Wilmot* in respect of warrants, which I before quoted, shew that it cannot be so; and I believe that *Wilmot* is an authority, which those, who maintain an opinion the contrary of mine, will not dispute. This case, moreover, was a case of felony; and there is every reason to presume, from the known practice of the *English* courts, that it was after indictment found. Besides, it was the mere resistance of process by an officer, which ought to be, at all events, obeyed. It is manifest, that public business could not be proceeded upon, were the officers and servants to question the authority of the Judges, in place of executing their mandates; consequently, this case of the constable of *Scarborough* does not at all bear upon the question, which this court has to decide.

It was felt by the Gentlemen who argued for the Defendant, that the authority of this case must be propped; but how has this been done? By a *dictum*—a *dictum* ushered in with great pomp, as quite decisive to overthrow all the argument adduced on the part of the Plaintiff—a *dictum* relied on principally, as having fallen from Chief Justice *Wilmot*; and contained ('tis said) in a most valuable and inestimable Book, entitled "Notes of opinions "and judgments delivered in different courts by the "*Right Hon. Sir Eardley Wilmot, Knight*, late Lord "Chief Justice of the *Common Pleas*, and one of his Ma-"jesty's most Honorable Privy Council," and therefore, for *Wilmot's* character and the character of this Book the *dictum* is to be decisive of this question. This *dictum* is as follows: "When he (a Judge of *King's Bench*) issues "his warrant as a conservator of the peace the court punishes "the officer who disobeys it, by attachment; why? Because "it is the act of a judge in his judicial capacity. Indeed it is an "obstruction to process, in that particular complaint." This *Dictum* is cited to prove, that this act of the Defendant was a Judicial act, within Lord *Coke's* meaning of the term—this act, called by *Wilmot* himself here, the act of him as Conservator—*Wilmot*, who in his answers to the Lords before noticed, says, that Judges issue War-

rants by their own proper authority, separate and detached from the Court) is here cited, to prove this act, Judicial. This *dictum* contradicts a line of cases; and contradicts a *dictum* of at least equal value, supported by undisputed authority.

In a novel and difficult case like the present—novel, I may call it, since it appears to be, under all its circumstances, of the first impression—and difficult, I may well suppose it to be, since I find myself compelled to hold an opinion different from the rest of my brethren—it may not be improper, to make some observations upon reports in general, and the *dicta* of Judges as occasionally stated in them, that we may the better decide upon the merit of those, that have been relied upon, as authorities to govern and decide this vital question.

Reports of decided cases may be called, "authenticated promulgations of the law, by the Judges of the land." But, what reports, and how authenticated? They are taken, not by public officers specially intrusted, but by private individuals, in learning, industry, and talent, extremely unequal; and it is to be lamented, that haste, inaccuracy, and not unfrequently mistake and want of skill, have obtruded on the public eye very crude and imperfect, and sometimes contradictory accounts of Judicial decisions—Whence then do reports of determined cases derive their true estimation and value? Not, because they have been handed down to us, by the justly celebrated names of *Coke*, *Plowden*, and *Croke*; and in more modern times, by *Burrow*, *Douglass*, or *Cowper*; but, because these cases were argued and canvassed on both sides, by the most eminent and distinguished lawyers of their time—because, after the Bench had received all the information upon the subject that could be acquired, their Judgments were delivered "in open Court," together with the reasons upon which they were founded—by patient, upright and learned Judges—and finally, because those Judgments, afterwards given to the world by diligent and intelligent men, have been on various occasions, and at different seasons brought before the tribunal of public opinion, examined, debated, and discussed by an enlight-

ened Bar, before the wisdom and learning of succeeding Benches, and by them allowed, accepted, and acted upon. Reports of Cases, thus sanctioned, are justly and rightly handed down to posterity, and received as recorded Promulgations of the law of the land.. Such, and so many are the requisites that should concur to give sterling character to a report before it can be received as law, conclusively to controul the opinions of future Judges.

It is true, all these circumstances are not found united in the report of every decided case: but I apprehend, that in whatever proportion any of them are wanting, in the same proportion, will the case on consideration appear to be deficient in value and authority. But, if the reports of decided cases ought to be received with such caution, and the degree of weight and authority they should obtain, be estimated with so much scrutiny. What shall be said of "*dicta*"? How far ought they to influence the opinion, or guide the Judgment of the Court? Upon this subject, which has assumed no inconsiderable degree of importance, on the present discussion, I beg leave to say a word or two.—"*Dicta*" are two fold: such, as fall from Judges in the course of their arguments in Courts of Justice; and positions, laid down by elementary writers; while discussing and explaining some topic or rule of law, which may be the object of their investigation. It is manifest, that if the *dictum* be the mere assertion of a Judge upon a matter, not the subject of previous argument at the Bar, uncorroborated and unsustained by any authority; it can have no weight whatever, but what it may derive from the legal name and character of him, who has uttered it..

Great respect is due, for instance, to whatever may have fallen from *Coke*, *Hale* or *Holt*—Yet the *dicta* of even such men are not authenticated declarations of the law: nor are they to be received as rules, governing the opinions, and controuling the Judgments of their successors—they may at times serve as clues to direct, as lights to guide the understanding, in the course of a novel and difficult investigation. Yet on examination, how few of the *dicta* reported will be found to deserve even so much

attention?—How many of them plainly appear to have been the positions of the reporter, and not of the Judge, to whom he attributes them? And even of those, that have fallen from the Judge himself; how few, after weighing the many circumstances that ought to be enquired into, before there is stamped upon them, any degree of authority, can stand the test? In ascertaining their value, the prime consideration, and the most important of all others, ought to be, what is the precise state of the question before the Court? Its different bearings? Whether it be a question, merely between man and man, or between a person in his private capacity, and an order or class of men; or finally between an individual and the State.

And, with regard to the last class of cases, I may remark as I proceed; that, although on points of constitutional law, involving or supposed to involve the rights of the subject and the liberties of the people; I should receive the *dictum* of a *Somers* or a *Holt* with the utmost deference and respect, yet in such a case I should not feel disposed to shew any regard whatever to the *dictum* of a *Scrogg's* or a *Jefferys*—The character of the man in such cases, is of the utmost importance; if the dross of low ambition, paltry intrigue, a love of power and its attendants, pomp, parade and patronage; will mix themselves with whatever may be of sterling in the Judicial character, what can the result possibly be, but a vile mass of base metal? Even in wise and good men, to whom no unworthy motives are justly imputable, prejudice and partiality will interfere, and unobservedly twine themselves round the fibres of the heart.

In *Bushel's* case, 1 *Mod.* 119, upon application made by counsel for the Defendant for time to plead; Chief Justice *Hale* is reported to have said, "I speak my mind "plainly, that an action will not lie—They will have but "a cold business of it."—Here I would ask, why should this good, this wise, this learned Judge, have spoken his mind thus plainly? Why should he say, they will have but a cold business of it in that Court—Had the case been argued? No: it had not been even opened or stated,

And yet Lord *Hale*, on a motion for time to plead, at once decides a great and novel question: instantly delivers a decided opinion, and at once anticipates his future judgment. He goes further—He declares, that Counsel who shall presume to impugn that opinion, who shall venture to sustain by argument their Client's case, shall meet from him a cold and unfavourable reception. Is it not manifest in this case, that prejudice and passion called forth expressions, even from that great man, which ought not to have fallen from him—and which, although they did fall, a prudent reporter and one who had a proper regard for the judicial character would not have recorded.

Take an instance of another kind—an instance, not of passion or prejudice, but of (what is equally mischievous, and equally to be lamented, an instaney noticed by Lord *Holt*) partiality. In *Groenvelt* v. *Burwell*, 1 Lord *Raym.* 468. He, Lord *Holt*, denies the authority of a *dictum* of Lord *Coke*, in 8 *Co.* 121. Dr. *Bonham's* Case, impugns it as the result of partiality, and uses these words, "But "*Coke* was transported, that the Doctor was a member "of the University, and of *his* University, as one may "see by his excursions in praise of it, which he looked "upon as affronted by that prosecution." Such are the infirmities of human nature, that but too often in the best, wisest, and most learned Judges, influence their opinions, and pervert their judgment. How extremely cautious should we then be, before we ascribe weight or authority to any *dictum* whatever!

Another most abundant source of error, appears to me to be the application of the *dictum* of a Judge (conveyed in general terms in the course of argument, which arises from the looseness of the opinion itself, or the inaccuracy of the reporter) not to a case similar in feature and character to that wherein the *dictum* has fallen from the Judge; but to one utterly dissimilar, and plainly distinguishable from it.

Thus have the general expressions, reported to have fallen in different cases, from great and learned Judges of the highest authority, such as "no action will lie against a Judge"—"all persons cloathed with a judicial character are protected from suit"—"no man is impeachable for a

judicial opinion, or an erroneous judgment"—and such like general assertions, stated to have been used by Lord *Coke*, by Lord *Holt*, by Chief Justice *De Grey*, by Mr. Justice *Blackstone*, by Lord *Mansfield*, and Lord *Kenyon*, in various cases that came before them, and upon different occasions. These several *dicta* have been cited in the course of the present discussion, not as arising from, or examinable by the peculiar circumstances of the individual case at argument before each Judge, but as promulgating an inflexible legal canon, not bending to any possible statement of facts—not yielding to any imaginable combination of circumstances, but all concurring in this universal conclusion, that in every conceivable case, a Judge of a superior Court is protected by his office from Action.

And yet, extraordinary as it may seem, not one of those cases, in which the *dicta* uttered by Judges have been so ostentatiously and triumphantly relied on, as closing all ulterior discussion, does any thing more than decide, what at the opening of the case was conceded by the Plaintiffs Counsel—What is now established as a legal principle not to be controverted, namely, that, whoever is clothed with a judicial character whether he be the Judge of a superior or of an inferior Court; Whether sitting at the commission of *Oyer* and *Terminer*, or at the Quarter Sessions; Whether the *forum* in which he presides be of peculiar jurisdiction, Sheriffs Court, or Manor Court, or whether acting under charters, as the Censors of the College of Physicians, all and every when called upon in their judicial capacity, to decide in their respective *forums*, upon cases brought before them, are (although their decisions be illegal, and their judgments founded in error) equally protected from action.

Another class of *dicta* may be found in those writers, who have commented upon, and illustrated different heads of our law. Of these (not to mention the venerable names of *Glanville*, *Bracton*, *Britton*, and *Fleta*, now chiefly resorted to by legal antiquarians) the most deservedly celebrated, are *Littleton* and his great commentator, and in later times *Hale*, *Hawkins* and *Blackstone*—Yet the legal

assertions, of even such men, should be examined with attention, and adopted with caution—Many of the *dicta* of *Coke* have been denied, either as unsupported by the antient authorities, cited by him to sustain them, or as unwarranted inferences, and unfounded conclusions of his own. Even the section of *Littleton* relied upon in the present argument, respecting the novelty of the action, appears to be open to observation; and the doctrine, there generally laid down, should be received with this qualification, that, where the subject matter of the action must, in the common intercourse of men, have been of frequent occurrence; there the fact of such an action never having been brought, is a strong argument, that in the opinion of professional men the action would not lie—and yet *Holt* seems not to have required the limitation of the generality of the *dictum*, but to have rejected it altogether, as not deserving of serious attention.—To close this head, I must only observe that all *dicta*, whether they proceed from Judges on the Bench, or writers in their chamber, must stand or fall—by their intrinsic merit: that it is not this celebrated name, or that, which ought to give them legal currency; but the touchstone of law and reason must be applied to appreciate their sterling worth.

Now let me revert to this *dictum* of *Wilmot*, and apply these observations. It is, in the strictest sense of the word, a mere *dictum*, or, in his own phrase, a mere *prolatum*—quite unconnected with his immediate subject of discussion, or any part of even his own argument, gratuitously thrown out, supported by him neither with reasoning nor with authority; unless then, every sentence in this Book be oracular, I do not know, why I am to pin my faith upon this *dictum* of Chief Justice *Wilmot*. The Book itself rested in undisturbed repose with its 19 Brethern, (for so many volumes of notes did *Wilmot* compile, during his attendance on the Courts,) for the 21 years of the compilers life; after his retirement from the Bench, and for ten years more after his death. At length the piety of a relative ("*Pietate laudatus aut excusatus*," is his motto,) caused the Book to be printed in the year 1802: from which time it continued unnoticed and unknown, 'till cited by Sir *V. Gibbs*, in the case of *Burdett* v. *Abbott*, in which

case, too it is observable, that neither Lord *Ellenborough* nor the other Judges took any notice of it, in pronouncing Judgment.

It comes before us, then unauthenticated by a responsible editor; and unadopted, indeed untried, by the profession. The Collector, attentive as he latterly was to character, and ambitious more than enough in his stile; for years of leisure, declined to give it to the public. The particular article moreover, in which the *dictum* appears, was not a pronounced Judgment; but merely notes of an opinion *intended* to have been delivered. Notes, taken during an argument, which was never completed, and prepared, if at all, before the case was ripe for the formation of an opinion—In such an article of such a Book, is this *dictum* found that is to decide the serious and important Question, arising upon these pleadings; perhaps upon consideration of the circumstances of the case, on which it is reported to have escaped, Chief Justice *Wilmot*, and his feelings upon the subject matter of that case; even his undoubted *prolatum* might not be entitled to our entire acquiescence.

The opinions of great Judges and whole Courts have been occasionly biassed, and warped by the accidental circumstances of the case, operating upon their temper and dispositions—and that it is neither irreverend nor unuseful to canvass them with such a view, I have (besides that of *Holt* before mentioned) the example of Mr. *Justice Foster*, who speaking of *Peachams* case, in his first discourse on high treason, has the following passage—" And perhaps " still less regard will be paid to it, if it be considered, " that the *King*, who appeareth to have had the success of " the prosecution much at heart; and took a part in it, " unbecoming the majesty of the Crown, condescended to " instruct the Attorney General, with regard to the pro- " per measures to be taken in the examination of the De- " fendant; *that the Attorney at his Majestys command,* " *submitted to the drudgery of sounding the opinions of the* " *Judges upon the point of law, before it was thought advi-* " *seable to risque it, at an open trial,* that the Judges were " to be sifted separately, and soon, before they could have " an opportunity of conferring together—and that for this

" purpose four Gentlemen of the profession in the service of " the Crown, were immediately dispatched, one to each of " the Judges, *Mr. Attorney himself undertaking to prac-* " *tice upon the Chief Justice, of whom some doubt was* " *then entertained.* Is it possible, that a Gentleman of " *Bacon's* great talents could submit to a service, so much " below his rank and character? But he did submit to " it, and acquitted himself notably in it. Avarice, I " think, was not his ruling passion; but whenever a " false ambition ever restless and craving, over-heated in " the pursuit of honours, which the Crown alone can " confer, happeneth to stimulate an heart, otherwise " formed for great and noble pursuits, it hath frequently " betrayed it into measures, full as mean as avarice itself " could have suggested to the wretched animals, who live " and die under its dominion. For these passions, how- " ever they may seem to be at variance, have ordinarily " produced the same effects; both degrade the man— " both contract his views into the little point of self-inte- " rest; and equally steel the heart against the rebukes of " conscience, or the sense of true honour. *Bacon* having " undertaken the service, informeth his *Majesty*, in a " letter addressed to him, that, ' with regard to three of ' the Judges, whom he nameth, he had small doubt of ' their concurrence, neither, saith he, am I wholly out ' of hope, that my Lord *Coke* himself, when I have in ' some dark manner, put him in doubt, that he shall be ' left alone, will not continue singular.'—" These are " plain, naked facts: they need no comment. Every " reader will make his own reflections upon them; I have " but one to make in this place. This method of fore- " stalling the judgment of a court, in a case then depend- " ing, at a time too, when the Judges were removeable at " the pleasure of the Crown, doth no honour to the " memory of the persons, concerned in a transaction so " insidious and unconstitutional, and at the same time " greatly weakeneth the authority of the judgment."

Sanctioned by this authority, I feel myself at liberty to ascertain the value of this *dictum* of *Ch. J. Wilmot* by the same standard: and I confess, I am the more disposed to undertake the ungracious and troublesome task, by reason

of the very great consequence, which has been attached to this *dictum*, which is, it would seem to solve all doubts in this case. *Wilmot*, as appears from his life, published at the same time with this work by the same Editor, his relative, was, in the words of his eulogist, a man of a mild, modest, meek, retiring disposition, who had advanced himself to the Bench, by what he himself terms his humility. (he was promoted by a Cabinet, in which Lord *Mansfield* was all-powerful) He was an abhorrer of noise, of bustle, of ostentation, of shewy ambition.

Active politics were not his province: he interfered not with, nor scrutinized the actions of those who conducted the affairs of State. He abhorred those troublesome intermeddlers, who dared to canvass the conduct of ministers, that happened to be his patrons. He declares, (in these notes of his opinion, from whence this *dictum* comes) that he "never read a pamphlet"—a curious circumstance in the life of a Barrister, and a Judge of the *King's Bench*—a circumstance, in which he seems to take pride! He had not been distinguished in the higher walks of his profession when at the Bar; confined to no court, he had expended his abundant leisure in compiling twenty volumes of Reports; not the most enlightened or invigorating exercise, for the mind of a constitutional lawyer, or an independent Judge. At length his inoffensive humility was invaded, or rewarded by Letters patent, appointing him to a seat in the *King's Bench*. He retained his principles, (if so I may call them) and in his conduct there was no change.—The chains of habit are not to be rent asunder in a moment, and the difficulty of loosing them is still more formidable, where they have not, in the first instance been put on by restraint, but are suited to the natural bent of the mind. The meek and humble *Wilmot*, at the Bar could not all at once become independent. Forward or decided on the Bench, or perhaps the business of humility was not yet quite complete. There remained a round of lowliness to climb. Be that as it may, he was not a troublesome brother to my Lord *Mansfield*, who became Chief Justice of the same court very shortly after. This celebrated man it is difficult to describe truly—That he was a great man, all must admit, however some may think,

that with great excellencies he combined great faults.—Descended from an ancient and noble family in *Scotland*, he early abandoned his native country, as a theatre ill suited to his talents, and his ambition. He soon attained the highest rank in his profession. He was a man indeed of rare and distinguished talents; and his natural endowments were cultivated and improved by all, that unwearied diligence and incessant application could bestow. His knowledge of law was extensive and profound; and the man, that would duly estimate his excellence therein, must study with attention his judicial opinions, as reported by Sir *J. Burrow*. His acquirements were not confined to professional learning. He had diligently perused, and was perfectly familiar with the *Justinian* Code, and the ablest comments upon it. Added to this, he was the most eloquent Speaker at the Bar, and inferior to none in the Senate; and his were all the treasures of ancient and modern literature.

That such a man should have been ambitious, is not surprizing, and his ambition was, like his mind, gigantic. He would not only be the first man of his age; but his age must become distinguished, from all that had gone before. To render the period of his elevation a new Epoch in *English* jurisprudence, seems to have been the settled purpose of his mind. For this, swayed perhaps, in some degree by a timidity, that dreaded the uncertainty of the tenure, and shrunk from the responsibility attached to the station, he sacrificed the Seals, the darling object of his young ambition. Power, permanent, though without display—influence, effective, but not ostentatious—were the solid means which prudence suggested to his mature and corrected passion; and therefore they were the constant objects of his pursuit, and his exertions; and finally, he attained them.

At the head of the Court of *King's Bench*, (some of the Judges obliged to him, perhaps, for their elevation, and possibly looking for further promotion from their humility,) he found himself in his proper sphere—no opposition—no resistance—no dissonance—he influenced and directed all. Though but one Judge of four, he was the

soul and organ of the Court. He then established that liberal and enlightened system of Commercial Law, which deserves the gratitude, and must ensure the admiration of every one who has knowledge to appreciate his labour. He brought forward, and illustrated the equitable and beneficial Action of *Assumpsit*; and disengaged it from the difficulties which had grown from narrower notions, and antient forms. He introduced and established order, punctuality, and dispatch in the business of the Court. Sanguine in his success, he attempted to break down the barriers between Legal and Equitable titles. Fortunately the advocates of the distinction were too strong for him. But it was in the matter of Libel, that the judicial opinions of Lord *Mansfield* have been most severely and justly censured. He seems to have regarded libel, as a species of state crime; cognizable only by the Judge—not to be entrusted to a Jury; they might be useful by ascertaining the fact, to divide the odium with the Court; but the question of Criminal intent, they must find, not examine.

To establish this doctrine, as the permanent rule of Law, Lord *Mansfield's* efforts were strenuous and incessant. Various were the conjectures hazarded, and the motives assigned for his conduct. Some ascribe it to his *Northern* connexions and early opinions, derived from the adherents of the abdicated family;—while others traced in it, too strong a regard for the *Justinian* Code,—an unacquaintance with, or inferior respect for the principles of the Common Law. But to me it seems the natural consequence and developement of his ruling passion—the desire of distinction, and the love of secure and undisturbed power and influence. How were they to be attained (it may be asked,) by violating the rights of Jurors, in questions of libel? I answer, that he must have taken a view of the domestic politics of *Great Britain*, during the last century, very limited and confined indeed, who does not discern, that such a Judge as Lord *Mansfield*, holding the decision of libel or no libel, in matters that concerned the Government, within his grasp, would in fact hold within it, in a great measure, the arrangements of the administration of the Country. Such a Judge might

make himself formidable to the administration or to the opposition, by protecting or denouncing, as suited the purpose he intended to accomplish, the work before the Court; and confirming or expressing his opinion by the verdict of a Jury.

That henceforth no Judge can wield this dreadful power, we owe to *Charles James Fox*, whose memory will be revered, while the people of *Britain* feel any portion of respect for Constitutional freedom:—whose love for the Laws and Constitution of *England* could be equalled only by his devotedness to her service, and his ardent zeal to procure for and preserve to her sons, those rights and liberties, which, as subjects of a free land, they are entitled to enjoy. He it was, that procured the legislative declaration on the subject. For my Lord *Mansfield's* efforts were, during a period, successful, though he met with powerful resistance. The rights of Juries and the liberties of the Press were, for a time, prostrated at the foot of the Chief Justice; but not without a struggle. The contest was protracted. Lord *Mansfield* did not escape with impunity. The violated liberty of the Press was vindicated by the Press: and he became the great object of its attack. Among other subjects of animadversion, his conduct in the case of *The King* v. *Wilkes* was canvassed, and exposed with great ability and severity (whether with justice I do not say) in a pamphlet published by *Almon*, and supposed at the time, to have been written by Lord *Camden*, entitled, "a Letter concerning Libels, Warrants, Seizure of Papers, &c." It was a work of great spirit. The writer dealt very freely with the character and principles of Lord *Mansfield*; and observed acutely and forcibly upon his extraordinary interference, and alteration of the Record, in the case of *The King* v. *Wilkes*, which he declared to be contrary to law and usage, unconstitutional and illegal. On the question of law I distinctly disclaim giving an opinion; but the act was very extraordinary, whether we consider the situation of the Defendant, the period of the proceedings at which it occurred, or the particular circumstances of the transaction itself. The sensation excited

was considerable. This was not at all allayed (it was much inflamed and irritated) by the pamphlet I have mentioned; which accordingly gave great offence. It was anonymous—and the vengeance that must be smothered, and dared not to indulge itself against the high station, character, and learning of the reputed Author, could be wreaked only upon the Printer.

Lord *Mansfield* was deeply interested in the event. His character as a Judge—his principles as a man—public and private—as a Senator—as the personal antagonist of *Wilkes*, were all deeply implicated by the publication. It must be stigmatized and reprobated by authority. To prosecute it by indictment, or even information, seemed tedious, and might be uncertain. It was resolved, not to entrust it to the uncertainty of a Jury—but at once to proceed by attachment, as for a contempt; and a motion for an attachment against the Libeller of Lord *Mansfield*, was made by the then Attorney General Sir *Fletcher Norton*, before the three puisne Judges, his brethren, as for a "Contempt of the Court." This proceeding was ably resisted, and exposed at the Bar. *Glynn* the Recorder of *London*, spoke at length upon it; and his exertions in this case introduced the celebrated *Dunning* to public notice. It was argued several times: yet no trace of it appears in *Burrows's* Reports of that period. Is it a strained inference, from this circumstance, contrasted with the general accuracy and minuteness of this Reporter, that the suppression was agreeable to his Chief Justice, who felt wounded in the transaction, and found nothing in the arguments or observations, that ensured to gratify his ambition, to heal his character, or assist his fame? His humble friend, *Wilmot*, had prepared a defence, tissued with high eulogium, and exalted notions of judicial power and pre-eminence—but even that was not pronounced.

The change of Ministry afforded a convenient pretence to veil the contempt of the Court, and the transaction out of which it arose—and this ambitious and elaborate composition was also withheld from the Press, during the life of my Lord *Mansfield*; who probably, (though in his

own case) had sufficient acuteness to perceive, that the defence was unsound, that the argument could not bear the light.

Wilmot, virtuous as he is described, engaged as he was personally, by his concurrence in the warfare against libels, and particularly the prosecution of *Wilkes*, influenced by feelings of veneration and affection for Lord *Mansfield*, (perhaps his Patron, certainly his Friend) by habitual respect and deference for the transcendent talents, and exalted endowments of his Chief Justice, whose superiority in proportion as it shed lustre on the Court in which he shone, eclipsed and repressed the exertions of the other individuals who composed it, and who accordingly for ten years, never ventured an opinion in contradiction or opposition to any of his, and we may suppose not unaffected by that humility (which formed so essential and useful a feature of his own character, and had, no doubt, contributed in some degree to the boasted unanimity) considered, as little less, than sacrilege, this attack upon Lord *Mansfield*, in the formidable form of a pamphlet—a monster, such as he had never encountered, which he appears to have abhorred, and been not unanxious to suppress. I should, therefore, receive with caution, even his pronounced judgment on the question itself, if any such had been given. I should apprehend, that it might be biassed by those feelings and habits. I should apprehend, that the warmth of interest and of temper, which prompted him to request the Counsel for *Almon* to consent to have affidavits, not entitled in the cause, read —to press them to abandon their duty—and by his private personal influence, to effect what, as a Judge, he could not direct—to ask of *Glynn* and *Dunning*, as Gentlemen, to grant as a favour, what as Gentlemen and Lawyers they felt themselves bound to withhold, the rights of their Clients, even at the risk of displeasing a Judge, who, if we are to form an opinion from the request, took more interest in the case than is usual, perhaps becoming; I say, I should apprehend, that he might not be quite cool or indifferent, giving his own judgment; and I should

scrupulously examine the argument, before I adopted the conclusion, asserted under such circumstances.

But, when I am referred, not to a pronounced judgment, deliberately formed, and solemnly delivered under the ordinary sanctions, but to an argument, prepared under such influence, and in such temper—never avowed by the author—prepared for private use, (God knows for what use) and a mere unconnected, unsupported *dictum*, is produced from that, to hood-wink my understanding, and fetter my judgment; I say decidedly, "I will not be "bound by it."

I have an understanding of my own; and, such as it is, it is my duty to exercise it, on the questions that arise before the Court—and, please God, I will do so—and I say *in limine*, I will not be bound by this *dictum*, of which I should have thought thus much "enough, and more than enough," did I not understand, that it had considerable weight in a quarter, for which I entertain the most unfeigned and profound respect. I feel it, therefore, right to look into the article or opinion, in which this *dictum* occurs—and, I think, that no friend of *Wilmot*, on consideration of it, and attending to the stile; will desire to have it considered a deliberate and weighed judgment. As far as relates to the acts of a single Judge, it sets out with declaring all observations to be beside the question, and *obiter*; then discussing the act of Lord *Mansfield*, (no doubt, a judicial act—an act done under the delegated authority of the Court—an act which the Court could discuss, and confirm, or annull, not at all like this Warrant —issued under a separate authority, which the Court could not control,) discussing that act, I say, he indulges in a very unnecessary and wandering rhapsody, upon the dignity of the judicial character; led away by his passion, or his subject, he becomes quite inflated, if not inspired; and calls one rule of the Court (by the by, an innovation of Lord *Mansfield*) a heaven born thought.—In this sober judgment, to be pronounced in a Court of Law, he leaves the plain and open track, which he said lay before him on the occasion, to vindicate his patron, and to impress the

the public with the notion, that it was little less than sacrilege to canvass or doubt the purity of his conduct. In his endeavours to magnify the judicial authority, he slides into the argument, *propter dignitatem*. He asks, "are the Chief Justice and Judges of this court, to wait "at the door of the Grand Jury chamber, with their "indictments in their hands; and afterwards attend the "trial before one of themselves?"

What is this, but a rhetorical flourish, which though he indulged to his pen in the closet, I hope would never have passed his lips on the Bench? Melancholy indeed, will be the day, when such vain and silly declamation shall be indulged from this place against the noblest bulwark of our Constitution—the venerable trial by Jury!—I should not mention, that he winds up his argument, by identifying the Judges with the Royal Dignity, and declares, that the important and enlarged (I use his words) nature of the principle of attachments for libels on Judges is, to keep a blaze of glory round them.

I say, I should not expose these passages, but that it is necessary to form an idea of the character and spirit of that declamation, from which the passage relied on has been cited. I have no hesitation in pronouncing it, to be the hasty and warm ebullition of a mind, fraught with arbitrary notions, irritated and excited by a severe attack upon his whole court, especially upon his venerated and adored Chief Justice; and the very reverse of what it is called a considered, digested, ulterior opinion. I have already shewn passages, in his own answer to the House of Lords, directly contradictory of this; and a passage, not resting on his authority, though if it did, it surely destroys the value of the authority it renders doubtful. I have done with this *dictum* and opinion; and now I come to the other—another citation from *Wilmot*, on which I shall very briefly observe, and have done with him; I mean his answer to the 7th question on the *Habeas Corpus* amendment bill. The opinion was right; but, as sometimes happens, the reasoning inaccurate. An action would not have lain against a Judge in the instance: but, not because no action lies against a Judge for a breach of

duty, (for an action does lie confessedly, and indisputably against a Judge, for a breach of duty, for refusing to sign a bill of exceptions.) It is so laid down by Lord Keeper *North*, in the rioters case, reported 1 *Vernon* 175, 1 *Eq. Abr.* 441; so insisted on as their right, by *Gregory*, *Eyre*, and *Dolben*, in *Bridgman* v. *Holt*, *Show*, *Pa. Ca.* where they request trial by Jury—from which, strong in conscious integrity, they did not apprehend any discredit or disrepute; and the document containing their request, is an authority of great weight—it bears openly the names of three Judges—and is considered to have been the production of the great and justly celebrated *Holt*.

I have produced *Wilmot*, contradicting *Wilmot*.—I have produced Judges, of great learning, and undoubted authority, contradicting *Wilmot*—and I rely, that he is not so infallible, that the Judges of this court are bound to surrender their judgments, and implicitly to follow his *dictum* against authority and principle, on a case of as much importance and involving consequences as vital, as any that has ever engaged the attention of a court of law. I do therefore conclude, from the authorities before discussed, that the act of the learned and respectable Defendant, now before the Court, was a ministerial act—at all events "extra-judicial"—and that, in either view of it, it was for him to have shewn, by his plea, sufficient excuse. This, the plea does not disclose—and therefore the Demurrer ought to be allowed.

But, before I conclude, I shall take notice of some other of the objections to this action, that have been made in argument, and which I have not yet adverted to. It has been said, that no action will lie against a Judge, for a *Fiat*, to issue a marked Writ, though wrongfully granted; and, therefore, that none lies for wrongfully issuing a Warrant, which it is contended, is a similar act.—Now, to my mind, there is no similitude at all between the acts, as will appear, when the history of this proceeding, and the mode of it, are briefly stated.—Indeed it will seem surprizing, that it should have been thought applicable to the present question.

The Defendant, in such a case, is arrested upon a *capias*—a Writ issued by *the court*—and which *in itself* authorizes the arrest of the Defendant—who, being arrested under it, had antiently no other remedy than an application to the discretion of the Sheriff, to take sureties for his appearance, on the suing *out of a Writ of Main-Prize.*

In cases of debt and contract, the Legislature has interfered, by several statutes, to prevent the holding to bail, where bail ought not to be required; or the holding to bail, for a larger sum than ought to be required. But, where the *Capias* was merely for a trespass *contra pacem*, the law was left as it stood before; and, to prevent an oppressive *abuse of this process*, the court interfered, and would not suffer an arrest to take place, except by leave of the court; and an imprisonment *under that process* (*of capias*) in such an action, is punishable, not as a false imprisonment, *but as a contempt of the Court.*

In this, as in other instances, the Court has, by its practice, delegated its authority, of *allowing* the *execution of the process of capias, according to the terms of it*, to a single Judge in his chambers; but, when he has exercised this authority, which is in *truth the authority of the court* (exercised according to the practice of the court *by him*) the arrest takes place *by virtue of the capias, as it did before*; the Plaintiff being, by the order, restrained from making any other use of it, than that of *holding the Defendant* to bail upon it, in the sum measured and allowed by the order. This too, is done upon a case judicially *brought before the Judge*, upon an application duly made, according to the practice of the court; and it is, in fact, one of the *similia* mentioned in 12 *Coke*, to "a due *examination* of cases out of court, which the "Judge *may and ought to do.*".

This proceeding, as *known and allowed in practice*, and by the course of the Court, has nothing in it analogous to the Case made by the plea.

A case, indeed might be supposed, not at all likely to happen (if I may now say so of any case) which might have some analogy to it. If a Judge should, without any cause instituted, or application made to him, *ex mero motu*, issue a Warrant for the apprehension of a man, for the purpose of being brought before him, and held to bail in any civil suit that might be instituted against him, that would bear some analogy to the case, made by the plea—and I should conceive, that his conduct in that respect would be extra-Judicial; and that it would not be justified by the single averment, that it was done by him, as a Judge.—That case would be like this; and, in that case I should be glad to know, why an action would not lie.

The next objection urged, is the novelty of this action. —This, truly, is a formidable one.—They quote the sage Lawyer, *Littleton*, "that it was an objection of great weight." What said Lord *Holt*, upon such an objection made before him? "that it was one, which deserved "no consideration—for (observed that great man,) "every case must be novel, until it is first brought for- "ward for decision. What is now perhaps a matter of "daily occurrence, must have been novel in the first "instance;" and cases, which are now constantly occurring, and found to require the interposition of the Courts, if this absurd objection were allowed to prevail, would be left without redress.—When they ask, was any such action ever brought? They should be able to answer, was any such Warrant ever issued. The objection would be of weight, if the act complained of, was of ordinary, or usual occurrence; but no such case as the present, or any thing like it, ever did occur. If it had, the objection of novelty would have been at an end; for *Englishmen* are not so timid, as to have submitted to it.

But again, it was said, that no action would lie against Counsel for any thing they might say, in the course of a trial, however injurious to the opposite party; neither against Jurors for the decision they may come to, even though their verdict was contrary to evidence; nor against

witnesses, though they might swear falsely, and thereby cause an improper and injurious verdict to be returned; and it was contended, that, therefore, an action would not lie here—But why, I have not learned—I have heard no argument to assimilate the act of the learned and respectable Defendant here, to these cases. The policy of the law affords protection to these persons, while actually acting in their respective capacities; and this policy is wise and necessary to the furtherance of the ends of justice; but, for no possible reason, by no possible inference, has it been shewn, that the protection granted to them, extends to the issuing of such a warrant by a Judge, as that complained of here.

Again, it has been observed, that the act of parliament, enabling Magistrates, against whom actions have been brought for any thing done by them in the execution of their duty, or in their character of Magistrates, to plead the general issue, and give the special matter of justification in evidence, does not include within its provisions the Judges of superior courts. Now, say the Counsel for the learned and respectable Defendant, it would be highly unreasonable, that Judges also should not be protected by the Law; or that they should be under greater difficulties in defending themselves, than inferior Magistrates are; and, therefore, they contend, it must be presumed to have been in the contemplation of the Legislature, that no action whatsoever would lie against them; and that this silence of the act with respect to Judges, must by implication be construed a Legislative declaration, that no such action will lie.

To call the silence of the Legislature, with respect to Judges, a declaration in their favour, is (it must be confessed) rather a bold figure of speech, and a mode, somewhat novel, of interpreting an act of Parliament. That I may not seem to reply by verbal criticism, to a serious objection, to this I answer: before the statute was enacted, enabling Magistrates to plead the general issue, actions had been frequently brought against them—many of them

vexatious and frivolous—others of a contrary description. That Magistrates should have every facility of defending themselves against the former, was conducive to the due administration of Justice; and was the end and scope of the statutes. But, could the Legislature then foresee, that, at some future period, a Chief Justice might arise, who, not called upon by the ordinary course of his duty, not urged by state necessity, should in his chamber, contrary to the practice of his Court voluntarily intermeddle, where a subordinate Magistrate was accustomed to act; and by this officious interposition, violate the liberty of the subject, in a manner then unheard of and unknown? I am disposed to think that the Legislature was not bound to foresee such an event; or, foreseeing it, to assist such a Chief Justice in protecting himself against its consequences.—In other words, is the Parliament called upon to enact laws, with references to past transactions—or, is it bound by anticipation, to Legislate prospectively for events that had never happened? With as much semblance of reason might it be contended, that, voluminous as the Penal Code at present is, a great addition should be immediately made, to the already too bulky volume; and punishments provided for crimes, that (however prone to evil may be the nature of men) have not yet appeared to exist, or at least have not hitherto been recorded in the ample history of human delinquency.

Further, it has been said, that this action is against public policy; that it would be totally against all principles of public policy, to countenance it, or suffer it to stand and that there is another and better remedy, by petitioning parliament. I deny both these positions. I deny, that the action is against principles of public policy, or that the Plaintiff here has a better remedy in applying to parliament. It is a just principle of public policy, that Judges shall, while acting in their judicial character, feel independent in their minds, which they cannot be, if liable to be questioned, either by the individual or the Government: and, accordingly, they are not. They are independent of both—if any thing can make them independent. But why should it be against principles of

public policy? The reason is to be found abundantly furnished, by the absolute necessity of the thing.

It is of the utmost consequence, that Judges in the exercise of their important functions, dispensing justice from the Bench to their fellow subjects, should feel in every respect independent, and have their minds undisturbed by any anxiety, but that which must attend every good and honest mind so employed, anxiety to administer justice uprightly and impartially under the law. They should not be distracted by apprehension of, or teazed by actions, prompted by the caprice or ill temper of perverse or litigant suitors; their judgments are not to be submitted to reconsideration or revision, but in the courts of appeal, which the constitution has created and appointed for that purpose. It would be absurd; it would be preposterous as well as unjust in the extreme, to subject men to actions for the errors of their judgments; to bring, not the doctrines they promulgate, or their adjudications before a superior court of appeal for reconsideration and examination, but the Judges themselves before co-ordinate tribunals, to answer in damages for such decisions, as equally fallible individuals may pronounce erroneous, or rather for such decisions as they may not assent to, or see the value and propriety of themselves, they themselves being equally liable to misconceive the law. It would besides be infinite, it would promote litigation without end—in the words of my Lord *Coke*, "If judicial matters 12 rep. 24.
"of record should be drawn in question, by partial and
"sinister supposals and averments of offenders, or any
"on their behalf, there will never be an end of causes,
"but controversies will be infinite—*et infinitum in jure*
"*reprobatur*." And in this point the law is founded in great reason. If the Judges were liable to actions of suitors, as they might be prompted by the weakness, wickedness, or folly of their own minds, or by the suggestions of profligate or injudicious advisers, to bring them, it would be impossible, that the administration of justice could properly proceed, in such a state of tormenting responsibility; and the end of the law, quiet and repose under decided and ascertained rights, would be unattainable—Courts of justice

would be useless—controversies and litigations would be infinite in number and duration. Therefore it is, that the exemption of judicial characters from liability to actions in such cases, was established. It was not to please, or benefit, or exalt the individual, that the exemption was given; it is not for his own sake, that the Judge is irresponsible; it is not to give false importance or "spread a blaze of glory round his head." No! it is because it became necessary to secure the pure and certain administration of the law of the land, for the attainment of justice.—It was for the sake of the community at large—for the good of the great body of the people, on whom this inviolability of the judicial character confers the most invaluable advantages; and accordingly the exemption is co-extensive with its principle, and confined to acts strictly judicial, which it is the policy of the law to protect and preserve undisturbed. This being the policy of the law, and its principle being the benefit and advantage of the community, not the exaltation or aggrandisement of the individual or the class—how can it be strained to protect the illegal imprisonment of the Plaintiff here? How can it be set up to oppose or oversee that other great and paramount principle of the law and the constitution, which watches over and guards the personal liberty of the subject;—a principle, of at least equally general importance and regard, well understood and acknowledged, incorporated in the most intimate manner with the constitution; and a principle, which the advocates of judicial privilege will do well to consider how they engage with, or set in competition against the idol of their admiration. For, if unfortunately they should become conflicting principles, and weighed one against the other, it cannot be long doubtful which will kick the beam. If there were even more in this declamation, (for I can call it nothing else which talks of the judicial character being degraded,) we should decide against this plea. If we were reduced to the miserable alternative presented, that either the judicial character must be humbled, or the fences that surround personal liberty prostrated, in the choice of difficulties I would say, let every Judge stand or fall in public estimation by his individual integrity and personal worth; it is of the very essence of the law, that the liberty

of the subject shall be strictly observed, and guarded with the utmost vigilance and care; and that no man's freedom shall be taken from him, without the judgment of his peers, aided by the consideration of the court on the law, as it affects the evidence against him.

This in the estimation of the constitution and of every man who is capable of feeling a spark of the sublime and enthusiastic admiration of liberty, which animated the breasts of those who reared the glorious fabric of the British constitution, is paramount; like *Aaron's* rod, it swallows up all others.—It is the first, and grandest, and most valuable principle of public policy, that that liberty, which the law ensures to every subject, shall not be infringed;—it is the right of every subject in this land;—by the enjoyment of the *British* constitution, he becomes entitled to it, at the moment of his birth; and it is not to be invaded or wrested from him with impunity, by a warrant illegally issued by any person, or from any quarter; nor explained away, by a new fangled maxim, founded upon a mistaken notion of policy, and strained beyond its meaning, the absurdity of which cannot appear more plainly, than when it is contrasted or set in competition with the other.

But it has been said, that the Plaintiff has a remedy in parliament; and that personal security is thereby sufficiently protected. Let this remedy be examined, and I fear, that if Mr. *Taaffe* be allowed no other, it will be found that he has no remedy at all. Parliament can afford no remedy or compensation for individual and private injuries;—they cannot be expected to attend to;—they could not if they would, try every private case; and if they could try, they could award no compensation. Parliament may interfere, for the purpose of bringing great public criminals to justice, such as I am happy to say, it would be necessary to go to remote times to find disgracing the Bench; but I fear this remedy would be found of little avail in the case of a private individual; nay, I have the authority of *Gregory*, *Eyre*, and *Dolben*, to say, that to institute such a proceeding before parliament,—to withdraw the investigation from the proper

Bridgman a Holt. Show. Par. Ca. Pa. 118.

tribunal "trenches upon all men's rights and liberties, "tending manifestly to destroy all trials by Jury;" they add, "that such a complaint is utterly unfit for the "examination of the houses of parliament, for they "cannot apply the proper and only remedy which the "law hath given the party in this case, which is, by "awarding damages to the party injured, (if any injury "be done) for these are only to be assessed by a Jury;" and they forcibly conclude, "that in as much as the "petition is a complaint, in the nature of an original "cause, for a supposed breach of an act of parliament, "which breach, if any be, is only examinable and triable "by the course of the common law, and cannot be so "in any other manner, and is in the example of it, "dangerous to the rights and liberties of all men, and "tends to the subversion of all trials by Juries, they "conceive themselves bound in duty, with regard to "their offices, and in conscience to the oaths they have "taken, to crave the benefit of defending themselves, "touching the matter complained of in the petition, by "the due and known course of the common law, and to "rely upon the aforesaid statutes and the common right "they have of free-born people of *England* in bar of "the Petitioner's any further proceeding upon the said "Petition; and pray to be dismissed from the same."

Surely, this argument against the proposed remedy in parliament is unanswerable, on public grounds alone; but waiving them for a moment, I ask of what use could it be to Mr. *Taaffe* to petition parliament? What possible advantage could he derive from it? Suppose all the previous difficulties (and numerous they are) surmounted.—Suppose his petition presented and entertained; and a vote of censure to pass in the House of Commons against the learned and respectable Defendant, yet this vote must be confirmed by the House of Lords, before he could hope for redress; and admitting, that it did pass the Lords, and succeed to the fullest extent, the only consequence would be the removal of the learned Defendant from his present situation. What compensation would that afford to the Plaintiff for the injury he has sustained? Certainly none. The Complainant would get nothing by such a procedure;

Now see what would be the consequence to the Judges themselves, of imposing upon them the necessity of answering before Parliament, upon every such charge, there made against them. How would it affect them? How would it derogate from their high station and character, and endanger their, at length established independence —nullify, and, in effect, repeal that wise law, enacted for securing the independency of the Judges, and the impartial administration of justice, which, if any thing can, has rendered the Judges independent of the Minister of the day? An act of essential and practical benefit to the people, as well as to the Judges, from whom it removed the danger of impeachment, or rather the inducements to acts meriting impeachment, more effectually than any thing that could be devised.

In former times the instances of tampering with Judges were not unfrequent. Indeed it was not to be expected, that influence and power so important, as the Minister must have derived from the subservience of the Judges, (and how far their dependance upon his nod was likely to secure their subservience, we are not left to conjecture,) would be neglected, and not brought into use. The great Lord *Bacon* himself, when Attorney General, was employed, and did not disdain to canvas the Judges, to sound them, and ascertain how they were disposed, preparatory to a well known trial, in which the Court felt warmly interested. The letters which passed on this occasion are still extant, and monumental of his disgrace. By those we find, that this celebrated and justly admired Philosopher, who was the great forerunner of *Newton*, who dispersed and destroyed the rubbish of the schools, pulled down the *Aristotelian* Philosophy, and substituted in its stead, a beautiful and sublime system of Physics—we find even this man becoming the tool of power, and descending to feel the pulse (as *Foster* calls it) of the Judges. He did not find them much averse to what was required of them; even *Coke* himself was not quite invulnerable. But such practices, it is to be hoped, are now at an end; the Judges are no longer removeable at pleasure; they are

now rendered perfectly independent, if any thing can render them independent. And though, as *Foster* says, "human nature is still poor human nature." I do hope and trust, that the independency, which the preamble of of the statute declares to be essential to the administration of justice, and highly conducive to the support of the honour of the Crown, and the security of the rights and liberties of the people, has been attended with these beneficial and glorious results; and that the Judges are as upright and independent in mind, as they are exalted in rank and dignity. The station, in which they are now placed by the laws and constitution of the country, is a proud and elevated one indeed;—they stand between the crown and the people, and should be equally inaccessible to the smiles of the court, and deaf to the tumults of popular clamour.

The situation they fill did not occur to that excellent *French* Philosopher, who studied the *British* constitution with much assiduity, who in that chapter of his work, in which he dwells with so much admiration upon that constitution, however says, "and this beautiful constitution will have its decay and dissolution, as well as "every other erection of man; and that time will be, "when the legislative power shall have become more "corrupt than the executive." But I will venture to tell Mr. President *Montesquieu*, that if ever the event which he contemplated shall happen, the *British* constitution will be saved by the Judges of the land. They will, in such a case, make a noble and effectual resistance against the inroads of despotism. It is in the recollection of all who hear me, what a stand was made by the parliament of *Paris*, when the *French* King came down, cloathed in all the power of hereditary and unmixed monarchy, to hold a bed of justice, and register his oppressive edicts. There the countrymen of *Montesquieu* himself, the parliament of *Paris*, composed of the Judges, (not at all resembling our Parliament, though bearing the same name) acted with so much integrity and firmness, as to merit the applause of the civilized world; and surely the Judges of this land will not be found (should they ever

be called upon in like manner) less alive to, or tenacious of the blessings of freedom. If ever the constitution of these realms shall be threatened with imminent danger of subversion, by a crafty and despotic minister, and a corrupt and subservient parliament, I am satisfied, that, in such an emergency, the last sanctuary of expiring liberty will be found in the temple of justice. Such are my confident expectations, founded upon the independency of the Judges; which expectations can never be shaken, but with that independency; and I do in my conscience believe, that no plan could be devised, more calculated to endanger that independency, than the encouragement of applications to parliament, similar to that now before the court, subjecting the conduct of the Judge, not to the investigation of the legal tribunals of the land, where surely his brethren will not overlook or neglect the respect and regard due to him, and his interest, and the interest of the public in him; but to a majority in parliament, influenced and procured by the administration of the day.

Suppose it should happen, that a corrupt and despotic minister wished to carry a point against the liberty of the subject; and that he found the purity and integrity of the Judge, an insuperable bar to the accomplishment of his design.—Suppose him to prevail on some creature of his, perhaps a person conceiving himself aggrieved by some act of that Judge, an enemy of his, to prefer a petition to parliament, containing a pretended allegation of misconduct, either altogether unfounded, or an highly coloured misrepresentation of something that had occurred; and thus give an excuse for removing him. Where is the independency of the Judges, if such applications are to be entertained and decided, not on the oaths of a Jury, but a vote of the majority. Again, (and in putting these cases, I am desirous that I may be understood, as not in the slightest degree insinuating, that such have occurred or are likely to occur in our days—thank GOD! the reverse is notoriously the case—but it is possible, that when I sleep in my grave, they may happen; and are therefore to be guarded against) if an ambitious, avaricious, or

designing Judge should feel disposed to act agreeably to the wishes of the minister, and thereby procure to himself and his family, honours, and titles, and emoluments, would it be no encouragement to such a man, (if such a man should hereafter be found; and that he could in former times at least, history bears witness) would it be no encouragement to such a man, to disregard the rights of the people, and swerve from his duty, when he reflected, that the injured and aggrieved party had no remedy, but by encountering the expence, the trouble, and inconvenience of a petition to the imperial parliament? A species of remedy which his finances, his connections, and his avocations might render impracticable to pursue. Little need he dread prosecution before such a tribunal, where as he would also consider, if the prosecutor surmounted every other difficulty, he must still cope with the whole influence of that minister in parliament, whom he the Judge had gratified by oppressing him. What private individual, under such circumstances, could consider the probability of redress, as other than idle and nugatory? How dread and dangerous must be the consequences of such a prosecution, calculated, as appears to me, to secure the impunity of the offender. On the other hand, see what oppression and severity the Judges themselves would labour under, if they alone, of all the community, are to be subjected to the vexation and embarrassment of a parliamentary investigation—to be brought before the great council of the empire, upon every trivial charge, which in the ordinary case, as between man and man, could be easily decided by a Jury. Upon the whole of this branch of the argument, I think myself well warranted to pronounce, that the Plaintiff here has no remedy in parliament; and again, that a petition to parliament in such a case as the present, is a mode of redress not calculated to benefit the individual, not calculated to serve or secure the Judges—it is a proceeding fitted only for the purpose of bringing great public criminals to justice; and has no bearing whatever on the cause before the court.

I feel that I have spoken at great length, and trespassed unusually upon the public time; but if ever there was a

case, which carried upon the face of it, a peculiar and striking excuse for doing so, the present is that case. I really cannot find words, to express the conviction impressed upon my mind, of the importance of it. It is nothing less than, whether or not there exists an authority in this country, which can, of its own mere motion and will arrest, and hold to bail any of *The King's* subjects he chuses, without information, cause, or provocation. A question before which, when seriously considered, all other objects are light and trivial—the injury the Plaintiff may have sustained—the wounded dignity of the learned and respectable Defendant—the degradation of the judicial character through him, become comparatively of little importance in the mind of every thinking man, in or out of the profession, and objects of minor concern.

I cannot proceed without observing, that in the first instance it really did not appear to me to be very judicious, perhaps not very decorous, (to call it by no harsher name) in the gentlemen who framed this pleading, to put upon the record a plea, raising such a question upon allegations which, as stated, in truth never existed—a plea not stating the facts of the case, but studiously suppressing them. It seemed then, as if it had been done for the purpose of entangling the court, and calling upon us to decide for the first time, upon an abstract proposition, involving these momentous and important consequences. The learned and highly respectable Defendant was represented by his plea, as having done an act of such a nature, that he would have been the very last man in the world to have done:—an act, from which his mild and humane disposition, and his known respect and veneration for the laws of his country, would have induced him to shrink with abhorrence;—an act, which would have contradicted the whole tenor of his past life, and been in derogation, not only of his knowledge as a learned, but of his principles as an upright Judge. He was represented, as having arrested an innocent man without cause or information, when, in truth and in fact, he had not less than three informations against this person. But those informations were waived, as forming matter of justification; and it was broadly asserted, that because he was Chief Justice,

he might arrest whomsoever he thought fit, without assigning any other reason, than that he was the Chief Justice; and without being amenable in an action.

If this high doctrine were to be established as law, the Plaintiff was left with out a remedy; and the Defendant owed his triumph, not to his justification upon the propriety of his conduct, if truly represented; but to a new interpretation of the law, which has been reserved for the present day to discover. When it was stated at the Bar, that this was not the pleading of the Chief Justice, but that it had been framed by those Gentlemen, who had the management of his case, even without consulting him, I was struck with surprize and indignation—the proceeding appeared to me unwise and indecorous—indecorous to the Court, as calling upon them for a decision upon the supposed misconduct of a brother Judge, which misconduct had never, in point of fact, existed;—unwise with respect to the public, whose feelings must be excited and agitated by the discussion of a question, of such vital importance to the personal liberty of every man in the country. For, who would suppose that a question so singular and so novel, was propounded to the Bench and the Bar, merely as a moot point, to exercise their ingenuity; and not with a view to practical advantage? And who would not expect, that an authority so sedulously and anxiously asserted, would, if established by the solemnity of a judicial decision, be sooner or later followed by an actual exercise of that authority, in the extent contended for.

It has been subsequently intimated to me, however, that the Counsel who had made this statement, was under a misapprehension, for that in point of fact, the learned Defendant was fully apprized of the nature of the plea, which he completely concurred in, and sanctioned it; and it was mentioned at the same time, that the reason which induced the learned and respectable Defendant to adopt this plea, was, the consideration of his high station. It was not because he was himself interested, that he put in this plea; he did not want its assistance, as appears from the third plea, which I am assured, contains a true statement of the facts;—the second plea was not therefore

intended for his defence, for it was unnecessary—but I am told it was conceived, that the power contended for was attached to the office; and the Chief Justice felt himself bound, not to abandon any of his privileges; but to transmit the office unimpaired to his successor, with all the privileges, powers, and immunities which belonged to it.

With whom this notion of the extraordinary power incidental to the office of Chief Justice originated, I shall not allow myself to conjecture; but it is certain, that the learned and respectable Defendant did not require the aid of this plea; and it is equally certain, that this kind of defence might be thought useful to others—it was a compendious mode of putting the Plaintiff out of Court; and of precluding the investigation of the proceeding on other grounds—but originate where it may, I regret, that the respectable Defendant was induced to adopt the suggestion, to endeavour to establish such a principle from any motive whatsoever. I would ask the Chief Justice himself, with the most unfeigned respect, could I ask him from this place: why, my Lord, exert so much anxiety and solicitude, in asserting for your successors the unenviable prerogative of doing wrong; and of exercising, if I may be allowed the expression, judicial despotism with impunity? With the same unfeigned respect, I would continue to ask, were this plea ultimately established, would you, my Lord, exert the power claimed? Would you order any man to be arrested from your own arbitrary will, without information, or imputation of crime preferred? I anticipate the answer, you would not—why then, at this unseasonable period, agitate the public mind, but too much disturbed already, by contending for a vain and idle prerogative, which you would not exert yourself, nor, I may reasonably presume, wish to be exerted hereafter, when you shall have ceased to fill the high station you now hold? I repeat it, why agitate the public mind? For, believe me, my Lord, many men out of the profession in this country, men of information, deeply sensible of the blessings of that invaluable constitution, which has heretofore sedulously guarded the personal liberty of the meanest individual, have been led to suppose, from the discussion of this question, at this time, that your Lordship has actu-

ally violated the law, and perpetrated the wrong imputed to you by this plea. With which plea I have now done, and with the arguments, upon which, I perceive I have dwelled for nearly five hours. Yet I have not exhausted the materials and authorities which I have collected, and which now lie before me, still less the subject; but I have exhausted myself. I have examined the question in every possible point of view, in which I could view it.—I have attentively weighed its importance, its magnitude, its novelty, its possible consequences, to both the people and the Judges.—I have stated broadly and unequivocally, that the judicial character was fully and completely exempt from action.—I have extended the acceptance of the term, "judicial" to its very utmost legal boundaries.—I have sought after every analogy, that could be possibly brought to bear upon the question; and searched, with more than common industry, for authorities which might either be decisive upon the subject, or might enable me to form a correct judgment upon it; and the result of the whole has been in favour of the Demurrer.

Notwithstanding all my diligence, I could find nothing on the other side, with the single saving and exception of the opinions and *dicta* of Chief justice *Wilmot*; and upon a careful examination, I have found that his authority in one instance, is opposed to himself in another;—that if properly understood, his *dictum* cannot be fairly brought to bear upon the present case; and that in fact, he is not such an authority (although I am free to admit, a most excellent man and conscientious Judge) as should implicitly sway the understandings, and bind the judgment of the court, upon such a question as is now before it.

Upon the whole then, (and I wish it to be so understood,) I do not entertain even a doubt upon the subject, other than what may arise from the novelty of the case, and from the circumstance of differing from my brethren. I am decidedly of opinion, that the act of the learned and respectable Defendant, in issuing this warrant, was ministerial; and if not ministerial, that as it appears upon the face of the plea now under consideration, it was extra-judicial.—That any person committing an act of either the

one description or the other, is bound satisfactorily to justify the same, by shewing proper cause for having committed it; and if he fails in doing so, that he is liable to an action of damages for the injury sustained; and that therefore, this Demurrer ought to be ALLOWED.

MR. JUSTICE MAYNE.—In this Case, however sorry I am to differ from the learned Judge who has preceded me, in pronouncing the Judgment of the Court, upon this important Case; yet I am decidedly of opinion, that the Demurrer ought to be over-ruled; and that the Plea contains a bar to this Action. I feel, that the cause of my differing in opinion from my brother *Fletcher*, is owing to his arguing on a question, that is not before the Court. It has been argued mostly at Bar and Bench, as if the question was, whether it was lawful or defensible for a Judge, without any offence committed, or charge made upon oath of crime or suspicion of crime committed, to imprison a subject—*ex mero motu*—out of his mere caprice or malice. Nothing in my apprehension is less like the question before us.—The *Chief Justice* makes no such question.—It is not the question here upon the Record. Saturday, 30*th Jan.*

(The learned Judge then read the plea to which the Demurrer was taken.)

The Action is for Assault and false imprisonment. The plea in effect is, that all that is necessary or proper for this Court to enquire into in this Action, is, that the Defendant is *Chief Justice* of the *King's Bench*; and as such, and in the course of his office of *Chief Justice*, issued a Warrant,—legal on the face of it—to cause this Plaintiff to do, what was necessary for his answering the Charge, (in the Warrant fully recited) of a criminal offence, fully also recited to have been sworn to; and that the only assault and imprisonment was the Constable's bringing the Plaintiff to give bail, in the course of this proceeding on that charge.—The Plea of the *Chief Justice* does not say, that it is the right of a Judge, to imprison without cause; but that it is the right of a Judge, not to be called on, in every man's action—upon every exercise of his official

authority to become a Defendant, before a Court and Jury—to shew and make out the case, by which it was his duty, as a Judge, to imprison the party charged with crime or misdemeanor.—But what is the fact to be put in Issue? It is this; the plea of the *Chief Justice* says, "you the Plaintiff, being imprisoned under my Warrant, have a right to try by your action, in a court of law, whether I am a Judge of the *King's Bench*; and whether I did more against you, than issue a Warrant according to the legal course, upon an alledged criminal charge.—If I have done more, you can, upon my plea, prove it.—If I made a warrant the fraudulent cover for oppression, or corruption, or malice, you can, on my plea, aver that.—If I have done any thing against you, not in the course of my office, you can say so.—If the charge recited in my Warrant, is no legal charge of an offence, your Demurrer will serve you.—But I deny your right to try before this Court and a Jury, in this Action, the grounds of my judicial acts, or the rectitude or legality of my judgment." The Plaintiff, not content with this answer, Demurs; and thereby contends, that the *Chief Justice* is by law bound here, in this Action, to come to trial, not only of the matter of fact which he offers for trial, but of all the facts, grounds, detail of proceedings, and circumstances of offence, charged against the Plaintiff; and also, that he must discuss, and bring to decision before this Court, or the Judge at *Nisi Prius*, the rectitude and reasons of his acts and judgment.—The plea brings the Case to the same question, as if the Plaintiff had declared, that the *Chief Justice*, acting as a Judge of the *King's Bench*, issued his Warrant in the regular way, with recital of informations before him on oath, of a crime committed by the Plaintiff; and that he held him to bail, to answer against that charge, in the proper Court. The *Chief Justice* has done no more, than bring on the record, what the Plaintiff omitted, of these truths.—If the Plaintiff had so declared, the *Chief Justice*, I presume, would have demurred; and I would be of opinion, that such demurrer ought to be allowed. It is now the same question, viz. does the imprisonment now appear to this Court, to have been a judicial act? If it does, the plea, standing admitted, is a Bar.

A second question, scarcely attempted to be made at the Bar, will not require much argument, and little more than an observation, namely, whether an action lies against a Judge, for his judgment or judicial acts.

A third question, rather mentioned than argued, was on the distinction between judicial acts, in Court, and out of Court.

And first: as to the question, whether an action lies against a Judge, for his judicial acts.—The *Chief Justice* is by the common law, a depository of the King's authority, for the purpose of administering justice to the nation—he acts upon oath, and upon high confidence; and immediately with his Court, represents the King in that sacred and important duty. The King does justice through his Judges—they are his delegates; and they are accountable to him alone, for the pure and honest performance of their trust; and they and the King are, towards the people in dispensing the law, as it were, one individual authority.—There must be some place and part in the stage of proceedings—some point in the administration of the Law, where unqualified confidence is to be reposed and acknowledged; and in the declaring of Justice to the nation, that place rests in the King's Judges.

The difference between the Judges of the superior and the inferior Courts has not been sufficiently attended to—The King's Judges stand next to, or with the King, or for him, appointed by him, and responsible to him; and he will have his Justice done by them, and by them alone. The inferior Judges stand under, and represent the authority of subjects; they have only the responsible power of subjects entrusted to them; or they are placed at a distance in responsibility from the King; and are subject to the controul and direction of the superior Courts. An action before one Judge for what is done by another, is in the nature of an appeal; and is the appeal from an equal to an equal.—It is a solecism in the law. I say, that the Plaintiff's case is against the independence of the Judges. The principle contended for, would annihilate that independence—Judges are to be equally independent of the Crown, and of the people. If

there must be parties in the nation, and one is inclined to degrade Judges and intimidate them into subjection to their views; it may also happen, that another party may be so inclined the next day—the partisans of a King may wish to reduce them to servility—the partisans of anarchy or revolution, to render them their instruments of a worse despotism, or intimidate them from the performance of their duty, and from restraining the first and insidious efforts towards confusion and rebellion.—The honest, good, and constitutional mind will always wish to find them entirely free and unbiassed; and will rather entrust them with a high and unquestionable authority, and if guilty, leave their punishment to parliament alone, than hazard their fortitude and independence by the alarm, and question, pains and expense of as many actions, as there may be acts of duty encountering the bad passions and prejudices of mankind. The constitutional idea of a Judge is "*dignity*," for the sake of *The King* and people. There was one case in *England*, where an attempt somewhat similar to this was made; an action against the Judges at the Sessions in *London*; and there it was soon decided, that no such action lay. Liability to every man's action, for every judicial act a Judge is called upon to do, is the degradation of the Judge; and cannot be the object o any true patriot or honest subject. It is to render the Judges slaves to every court that holds plea, to every Sheriff, Juror, Attorney, and Plaintiff. If you once break down the barrier of their dignity and subject them to action, you let in upon the judicial authority a wide, wasting, and harrassing persecution, and establish its weakness, in a degrading responsibility.

As to authorities upon the subject, no such Action was ever sustained; and save that of *Hamond* and *Howel*, so often mentioned, none ever was attempted, but once before, and that in *Ireland*, where also it was thought of, to bring an action against the Chief Governor of the country. But, as in the case of the King's Judges, so in that of his representative the Lord Lieutenant of *Ireland*, the constitutional remedy, if there were misconduct, is before the King and the Parliament. The case attempted in *London* was the strongest imaginable.—The Re-

corder of *London* was the Judge; his act was expressly declared illegal by the court of *King's Bench*, upon discussing the case on a *Habeas Corpus*, *Vaughan* 135. Upon that opinion of the Court, an action afterwards was brought against him in the *King's Bench*, before Lord Chief Justice *Hale*, and his brothers; and what were *Hale's* expressions, "That the Action would not lie. "That in the Case of an erroneous Judgment, though a "writ would make void the Judgment, it doth not make "the awarding the process void to that purpose; and "the matter was done in a Court of Justice; and that "they would have but a cold business of it," 1 *Mod.* 119. And afterwards in 2 *Mod.* 218, the same case came on; and *Howell* having pleaded the special matter, the Plaintiff replied, *de injuriâ sua propriâ*; and to this the Defendant demurred; and what was the opinion of the whole court, "That the bringing the action was a greater "offence than the fining of the Plaintiff, and committing "him for non-payment; and that it was a bold attempt "both against the Government and justice in general. "It was an error in judgment, for which no action will "lie."

There is no other reported authority, for there was no other case of such an action attempted; but there is plenty of solemn authority, on the law and principles of such an action. Beside Sir *Eardly Wilmot* and Lord *Coke*, the authorities of both of whom have been questioned, *Rolle*, *Hale*, *Hawkins*, *Blackstone*, *De Grey*, and whoever else at the Bar or Bench have been referred to on the subject, are decidedly against the monstrous doctrine contended for by the Plaintiff. We find in 12 *Co.* 23, "Jurors not to be drawn in question, nor "Judges. No proof to be admitted against the pre- "sumption, that they, as sworn, will do justice. They "are guardians of *The King's* Oath, and are to answer "to him alone; for otherwise it would tend to the scandal "and subversion of all justice; and those who are the "most sincere would not be free from continual calumni- "ations. For *Multæ insidiæ sunt bonis.*". In 2 *Bl. Rep.* 1141, *De Grey*, Chief Justice, said, "it is agreed, "the Judges in *The King's* superior Courts of Justice,

Floyd a *Barker.*

Miller a *Seare.*

" are not liable to answer personally, for their errors in " Judgment; and this, not so much for the sake of the " Judges, as of the suitors themselves.—The protection " in regard to the superior Courts, is absolute and uni- " versal; with respect to the inferior, it is only while they " act within their Jurisdiction;" they must shew the matter to be within their jurisdiction; and again, we find the following passage in 3 *Bl. Com.* 41. " *Bracton* expresses " the power and dignity of the *King's Bench*, where he " says, that the Justices of this Court are *Capitales, gene-* " *rales, perpetui et majores, a latere regis residentes,* " *qui omnium aliorum coorigere tenentur injurias & errores.*"

And with those ancient and high authorities in our Law, is perfectly consistent what is said by *Wilmot* 104. In answer to the question by the Lords, whether if a Judge, before the Statute of *Charles*, had refused to grant the *Habeas Corpus*, the subject had any remedy at law, by action or otherwise against the Judge, for such refusal, he says, " I think that the subject had no remedy at law, " by action or otherwise against the Judge, for such re- " fusal. The denying a Writ stands upon the same " ground, as any other breach of duty." And in page 259, he illustrates his doctrine thus, " The Constitution " has provided very apt and proper remedies, for correct- " ing and rectifying the involuntary mistakes of Judges; " and for punishing and removing them for any voluntary " perversions of Justice." It is also laid down in an ancient case, in 1 *Rolle's Ab.* 92. " No man shall have an " action on the case against a Judge of Record, for giving " a false judgment." Again we have the opinion of an eminent writer on Criminal Law, and of comparatively modern authority,—Serjeant *Hawkins* thus expresses himself in 2 *Co. Pl.* 147; " This Statute (*Habeas Corpus* " act) makes the Judges liable to an action at the Suit of " the party grieved, in one case only, which is, the refus- " ing to award a *Habeas Corpus* in vacation time; and " seems to leave it to their discretion, in all other cases " to pursue its directions in the same manner, as they " ought to execute all other Laws, without making them " subject to the actions of the party; and this seems most " agreable to the general reason of the Law, which re-

" gularly will not suffer a Judge to be liable to an action, " for what he does as Judge." And observe, here he was speaking of acts, done by Judges out of Court. Again in the same book page 186. " No man is liable to an " action, for what he doth as Judge."

What says my Lord *Chief Justice Hale*, in *Howel's* Case; " I speak my mind plainly, that an action will not " lie. In case of erroneous Judgment given by a Judge, " shall the party have an action of false imprisonment " against the Judge? No; nor against the officer neither " —the matter was done in a course of Justice," and again in the same case, 2 *Mod.* 218.—the whole Court treats the action as Criminal, and said, " that the bringing the " action was a greater offence, than fining the Plaintiff; " and that it was a bold attempt against the government " and Justice in general." See how such an action was considered by the Bench and the Bar, in the celebrated modern Case, of Sir *Francis Burdett* v. Mr. *Abbott* the Speaker of the House of Commons, in 14 *East.* 123: Justice *Batley* asks the Counsel this question, " would an ac- " tion lie in the Court of *Common Pleas* against the " Judges of this Court, or any of them who signed a " Warrant of Commitment;" and how is it answered by *Burdett's* Counsel, Mr. *Holroyd.* " Certainly no action " would lie against Judges—they are accountable in ano- " ther way—no ordinary proceedings in the common way, " can go against them; but, with submission, if they is- " sued a Warrant of Commitment, in a matter of which " they had no *Jurisdiction* at all; and that it so appeared " on the face of the Warrant, an action would there lie " against the *Officer*, who arrested or imprisoned the party " upon such Warrant." We find also Legislative opinions upon this point appearing in the Statutes empowering Magistrates to plead the general Issue, giving in such cases notices to Magistrates, limitations of actions—costs *&c.* If this action lies here, so would it in any the most inferior Court in the Kingdom—The Law draws no distinction—It is admitted, that no action lies against a witness for what he deposes in a Court of Justice, because he must be free and unfettered in giving his evidence, and he is brought there in the course of Law, and by the summons of the King.

As to the question, whether the Warrant here was a judicial act, the ground of argument arose from a confusion of ideas; because it is stated, that certain other persons besides Judges, have power to do the like act in certain cases—if it did not occur, that another, who is not a Judge of *King's Bench*, issues such Warrants, it would not probably be argued, that when a Judge of *King's Bench* issues one, it is not a Judicial act. Here is an act done by one who is a Judge—done in a matter within his jurisdiction, as a Judge; and *bona fide* intending to act therein, as a Judge.—How then can it be imagined, that it is not a Judge's act? Why forsooth, say the Counsel for the Plaintiff, the *Chief Justice* is a Justice of peace or a Conservator, and a *Chief Justice* distinct; and we tell you, he must have done such an outrageous act as this, in his second person and in his inferior character as a Conservator, and not as a *Chief Justice*—If it could be thought of, as a serious question—as a good ground of defence, the Plaintiff would have replied so, and not demurred; for by so doing, it is admitted, that if there is no legal impossibility of the act being done as Judge, it was done as Judge, and in no other character—

But it is said, that the Act 48 *Geo.* 3. c. 58. is the only authority by which a Judge of the *King's Bench* can issue any Warrant for a misdemeanor, before indictment; and it is truly said, that this Warrant is not under that Statute, and is therefore void; or is nothing more than the Warrant of a Justice of Peace, in the person of the *Chief Justice*. But read the Statute; and I ask, does it declare, or even imply any thing against the Judge's power, which he has practised universally, time out of mind; and which power is recognized by the authority of *Hawkins* and *Dalton*? Is not the Statute made expressly, to extend the kind of proceedings, before given in Revenue Cases; and to give Warrants marked for bail in specific sums; and to give plea and appearance by default? Indeed if this Warrant is void, as a Judge's Warrant, I don't see how the Justice of Peace got the power to issue it, or the Conservator, mentioned by my brother *Fletcher*.

A Judge of *King's Bench* is as much a Justice of Peace,

as he is a Constable or Coroner—He has in him the power of all these; but he is not thereby the less a Judge—Justices of Peace are ministerial often—Judges of *King's Bench* never.—It is said, that they are ministerial to the King—why? On the contrary they have his whole legal power, in matters touching the administration of justice; and he cannot act but by them—See the ludicrous consequences of treating them as ministerial, or subjecting them to action. They become amenable to every other species of correction by a Court, attachment, &c. One hour at the Bar—the next on the Bench, of the same or some other Court. They would have a busy and a harrasing time, getting from one station to the other—from the Judge to the accused—from the corrector to the corrected.

As to another topic relied on in the course of the argument, I must differ from those, who have preceded me; for I consider one Judge's act to be the act of all the Court: and my Brother must be under some lapse in that respect, in arguing on the contrary principle; for in my mind, a Judge in his Chamber does no act, which the Court may not also—Even his bailing, is not like a Justice of the Peace's bailing; but according to his discretion, and he has that power in all cases whatsoever, 2 *Inst.* 189; nor was he ever thought to be affected by any of the multitude of Statutes, on which the power and authority of the Justice of Peace depends—his power is by the common law—How does the Warrant of the Court differ from the Warrant of the Judge? Not in the least—Consider the nature of side Bar rules, and other acts of the same kind.—Fiats—taking bail—refusing it—granting Habeas Corpus—refusing it—discharging on it—remanding on it—*et cetera*. Would an action lie for every one, or for any one of these acts? What distinction is there between these and the most solemn acts of the Court, in respect of the protection of the Judge? And what difference between them and this Warrant? None! It is only a confusion of ideas; because it is a thing, which in certain cases, can be done by others, who are liable to the *examen* of the Courts, by action, which Judges are not—and this doctrine and reasoning is amply sustained by the

several cases cited and commented on at the Bar, namely, *Ca. Temp. Hardw* 57. *Rex.* a *White.*—The arguments of the Judges in *Rex* a *Wilkes*, 4 *Bur.* 2569, and also by the case of *Goldschmidt* v. *Marryat* 1 *Campb.* pa. 562; and *Wilmot* in the Case of *Rex* a *Almon*, pa. 265. says "I can make no difference between "a Judge acting in Court, or Judicially out of Court. "(speaking as to the protection, privilege, and dignity of "a Judge, in a case of libel.) He acts by virtue of the "patent appointing him a Judge, and of the power which "the law gives him in that character and capacity. "When he issues his Warrant, as conservator of the peace, "the Court punishes the officer who disobeys it, by attachment. Why? Because it is the act of a Judge, "in his judicial capacity. (Thus confirming the case of "*Rex* a *White.*) Suppose he was calumniated for issuing "such a Warrant, would not the Court grant an attachment?" And in pa. 97, he again says, "The acts "done in Court and out of Court, taken together, form "that system of practice, by which the benefit of the "law is dealt out to the people." And in pa. 100, "Judges issue Warrants of their own proper authority, "separate from the Court, and out of Term." Almost the same words are used by the three Judges in *Wilkes's* case, 4 *Bur.* 2659, "A great deal that may be done in Court, is done by Judges at Chambers, in Term time; in vacation a great deal more is done by them in Chambers; because it can be done no where else." This Judge, Sir *E. Wilmot* has been on the present occasion, I believe for the first time, assailed in his character for knowledge and integrity; yet, in the parts only of his judgment in *The King* a *Almon* which press on this case, he has other support than my opinion of him—so has the Court in which he sat; and the able reporter of their enlightened and unanimous decisions. With respect to the book of his opinions, upon which so much has been said—what is *its* intrinsic merit? What its authority? Does it not prove itself? Has it not as good a claim to respect; and ought it not carry as much weight with the law world, as other great men's commentaries? At least, how did the Court and Bar receive it, in *Burdett* a *Abbott*, where Sir *V. Gibbs* cited the Judge's argument in *Almon's* Case, and called it his "admirable argument."

So far, I think, upon principle and authority there can be no question of the protection of the Judge, for acts done out of Court, as well as done upon the Bench; and now, as to the act in question being one, which he might do out of Court, see 2 *Hale, Pl. Co.* 5, 6. "Any of "the Justices of the *King's-Bench* may issue out their "Warrants for apprehending of a malefactor, or for "surety of the peace in any county;" and *pa.* 105, as to the power of the *King's-Bench* in cases of breaches of the peace, and before indictment. "The Court of "*King's-Bench* hath not only a power to issue Writs, "upon indictments or appeals before them, but have also "power by order, to command the Sheriff of the County "where they sit, or the Marshall of the Court, to ap-"prehend felons or disturbers of the peace, and bring "them before the Court." Until all things are reversed, neither superior or inferior Courts, nor Jurors must try and discuss the *King's* Judges, or their judicial acts; nor Sheriffs or Coroners return Juries on them;—nor the Judge, who is deciding on life, liberty, or property on one side of the hall, be tried on the other side, perhaps on the most debasing charges;—nor is the prisoner at the bar to be a Juror on his trial the next day;—nor the senechal, who comes under his animadversion one day, be his Judge the next. If the entrusted and sworn Judge, into whose hands is committed the royal and sacred trust of administering the laws of his country, will be base or corrupt for minister or mob, for party or individual, he will meet his desert, where the constitution has placed the bar for his arraignment, and before the tribunal of the whole world, and of his own heart.

With respect to the plea which is here put upon the record, in bar to the present action, I think there ought not to be a second opinion, as to the necessity and propriety of putting it in by the Lord Chief Justice of the *King's-Bench.* I can easily believe with Mr. *Radcliff*, that the Chief Justice wished the decision to be on the abstract question, whether he ought to give other answer to the action than he has done by this plea. I think that those who surmised, that this plea was prepared against his approbation, as if it was unfit for his candid and honourable justification, took

away from him a merit to which he is entitled, and which is a further proof of his just conception of the judicial character, of his constitutional spirit, and of his fortitude and personal disinterestedness. I have a perfect recollection of the learned and respectable Defendant stating to the Judges, (when taking their opinion whether he should sit on the trials of *Kirwan* and others,) that he was resolved to take no step in this action, nor put in any plea that should compromise the constitutional rights of the Judges, or desert that dignified and constitutional defence which a Judge ought to make. It happened, that my brothers *Fox* and *Fletcher* were not present at the time, and it may be a fact with which they are unacquainted; but I thought it infinitely to the honour of the Chief Justice of the *King's-Bench*, to display a temperate, but fixed resolution to sustain the legal rights and privileges of the judgment seat, of which he was the trustee. A more puny spirit might have shrunk from the contest, and have said, that each Judge, as attacked, might defend himself, and that he would incur no pains or expence in exposing the dangerous and unconstitutional principle of the action, having a short and easy mode of shielding himself, by submitting to the principle of the action, and putting his case on the legality of the charge made against Mr. Taaffe, in the information laid before him; and which had been decided on by the Court of *King's-Bench*. A less pure or less impartial Judge between public opinions, might have been insensibly led to plead on easy or popular grounds; and to leave such innovating questions to others to combat. I think it must be matter of satisfaction to the subjects of the realm, to have a Chief Justice who puts himself in the breach, when the Judges of the land and the judicial authority and independence are assailed, in a way tending to sap the foundations of public justice. But this I feel confident, that the proceeding against him in this instance, instead of degrading him, as may have been expected, has elevated him in the estimation of every feeling and honourable mind. Abandoning the position which he here holds—surrendering the questions which he has defended by this plea—and submitting to the examination of the ordinary jurisdictions, like a private Magistrate or individual, might better have

been considered, a betraying of the confidence reposed in him by the *King*—a surrender of his authority,—and of the rights which the people have in their Judges.

If there is any man who really thinks, that his interest is adverse to this privilege of the Judges; let him undeceive himself; and let him learn, that it is part of the genuine principles, and connected with the very existence of the constitution; and that the Judges are not to be employed in defending themselves against such actions, or warped by the apprehension of them, or degraded by the proceedings in them; and let him discover, as he easily may, that he is the best Irishman, as well as the best Judge, who will not part with any of the rights established by the law for his protection, and the protection of the people through him. The employment of the Judges is to dispense the law —The credit of the Judges is the sinew of the law; without it the law falls—the Trial by jury to which the constitution refers all its proper cases and none other, is the corner stone of the constitution—Juries cannot act without Judges; and if the credit of the Judge falls, the trial by jury will not long survive. Let the people beware equally of those men, who would make a system of attacking either.

MR. JUSTICE FOX.—Two of my brethren having given their opinions upon this record, at considerable length, it will not be necessary for me to occupy much of the public time. My brother *Fletcher* in giving his Judgment, differed from the opinion pronounced by my brother *Mayne*, who has just closed his Judgment and his Argument.

It now, of course, devolves upon me to state my opinion, and such reasons as have decided my mind in forming that opinion—not so much at large as either of my brethern have done, for, indeed they have, in their respective views which they have taken of the case, stated the principles of Law and the authorities, together with the reasons and grounds of their opinion as applicable to the present case, so fully, that in following either of them, I

would do injustice to the ability with which they have argued the question.

The questions which arise upon this record, appear to be two; the latter branching out into different modifications, as appeared in the course of the argument. The first question which I deem myself bound to decide, is, whether the arrest, as it is stated by the Defendant, is legal or not. The second question is, supposing that the arrest, as it is stated upon the record, is not legal, whether the Plaintiff is barred of his action, by the matter stated by the Defendant in his plea. I feel myself bound to consider, and decide the first question; because, if I should be of opinion, that the plea discloses sufficient matter of justification, to shew the arrest legal, then, the second question could not arise.

It is my opinion, that the matter stated by the Plaintiff, does not justify the arrest; and that the arrest was not lawful in the manner in which it has been pleaded. It is necessary to keep the consideration of these two points seperate and distinct, and not to let the subject matter of one question, influence the discussion of the other; indeed I apprehend, that some little difficulty, perhaps I might say confusion, has arisen from drawing an inference too hastily, that the decision of the first question was to close and decide the second question, which possibly was the only one intended by the Defendant to have been proposed to the Court, as the other has not been much relied upon at the bar.

The plea states the letters patent appointing the Defendant Chief Justicet,—that being Chief Justice, and by virtue thereof, and as such he made a Warrant, reciting in the Warrant, that a certain information upon oath had been made before him, and that by virtue of this Warrant the arrest was made. It is a principle in law, that the liberty of any subject of this realm is not to be restrained by any Magistrate whatsoever, unless by presentment or due process of law. In this case the arrest is stated to have been made solely as an arrest to bring the party before a Judge of the Court of *King's-Bench*;

and the Warrant under which the arrest is made, is stated in the usual course of such Warrants. No principle of authority in the Magistrate is referred to,—nothing more is relied upon by this plea to justify the arrest, save barely a recital in the Warrant, that an information was sworn before the Defendant, charging the Plaintiff with a certain offence. I think, that the Defendant issuing a Warrant of arrest, ought, in order to justify such arrest, to set out and aver in his plea, the informations previously sworn. It would be, in my opinion, carrying the case beyond the bounds of law, and be dangerous to the liberty of the subject to say, that the Chief Justice, or any other Judge of the *King's-Bench*, or any Magistrate has in himself an authority of arresting by Warrant any subject of the realm, upon a bare suggestion in the Warrant, that the party did a particular criminal act. In order to constitute the arrest, a legal, one, the criminal act must be duly evidenced to him by information upon oath. I am perfectly aware, that the highly respectable and much revered Defendant in this case, was in fact authorized to issue his Warrant, by a regular information duly taken and sworn before him. But it is not so avowed by this plea. The authorities which have been resorted to on this part of the case, if authorities are here necessary, are 4 *Bl. Com.* 211. 2 *Hale, P. C.* 198. 110. and 2 *Hawk.* 135. In giving this opinion on this first point in the case, I must be understood as not imputing in any way the slightest irregularity to the Defendant in this case.—The point is made by the mode of pleading, and does not in any manner arise from any act of his.

I now proceed to the second question in this case; namely, whether on the whole matter disclosed by the Defendant's plea, the plaintiff can have or maintain his action against him. It has been relied upon, that the Defendant has alleged, as Chief Justice, sufficient matter to shew, that he acted in a judicial capacity, and is not answerable in this action, or indeed in any action, for what was done by him as a Judge, in a Court of justice.

The principle at law, of exemption from being sued for

matters done by Judges in their judicial capacity, is of great importance—It is necessary to the free and impartial administration of justice, that the persons administering it shall be uninfluenced by fear, and unbiased by hope.—Judges have not been invested with this privilege for their own protection merely;—it is calculated for the benefit of the people, by insuring to them a calm, steady, and impartial administration of justice;—it is a principle coeval with the law of the land, and the dispensation of justice in this country; and is founded upon the very frame of the constitution;—it is to be met with in the earliest books of law; and has been continued down to the present time, without one authority or *dictum* to the contrary, that I have been enabled to find. My brother *Mayne*, who preceded me, has given a clear and lucid detail of the authorities, as they have arisen from time to time. Most of them were mentioned in the course of the argument, at the bar. After the manner in which they have been stated by him, it becomes superfluous now for me to travel minutely through them again; but I think myself called upon, in assertion of this principle, so vitally necessary to the administration of justice, to maintain it in such a manner, as may be requisite to give it full effect and operation; still however, not trenching in any manner on the rights of the subject, which this principle is intended to protect, not to injure or infringe. It appears to be most necessary, that a Judge administering justice shall not be liable to answer for acts done judicially by him, by the way of action or prosecution;—they are only answerable for their judicial conduct in the high Court of Parliament; and without the existence of this principle, it is utterly impossible, that there could be such a dispensation of justice, as would have the effect of protecting the lives or property of the subject. A Judge must—a Judge ought to be uninfluenced by any personal consideration whatsoever operating upon his mind, when he is hearing a discussion concerning the rights of contending parties; otherwise, instead of hearing them abstractedly, a considerable portion of his attention must be devolved to himself. There is something so monstrous in the contrary doctrine, that it would poison the very source of justice, and introduce a system of servility, utterly inconsistent with the constitutional independence of the Judges,—an

independence which it has been the work of ages to establish; and would be utterly inconsistent with the preservation of the rights and liberties of the subject.

The leading case in which this principle has been stated particularly and at large, has been already amply dilated upon,—I mean the case of *Floyd* a *Barker*, 12 *Coke*, in which the principle was extended to Magistrates. The reasons for extending it so far, are stated with such accuracy, that no case has occurred since that time, which has not bottomed itself on that adjudication. Indeed, it has not been controverted, that for any act done by a Judge sitting in Court, he is not responsible in an action to the party conceiving himself aggrieved. But this is not the extent of that case—It embraces not only judicial acts done by a Judge sitting in Court; but also acts done by him out of Court. After mentioning, that for acts done openly in Court, the Judge is not responsible, it proceeds "nor for acts done out of Court, such "as the due examination of causes out of Court, and "enquiring by testimony and other such things; because "they are fit to be done by the Judges." Here expressly extending the principle of protection, beyond the limits of acts done in Court, to acts done out of Court, giving examples of each. The present case comes within the authority of this leading case; it is within the principle of that protection, which the Judges are clothed with, for acts done by them as such. The case goes on, least there should be any mistake, to shew what Acts are *not* within this protection, "as if a Judge hath conspired "before, out of Court, this is extra-judicial;—subor-"nation of witnesses; and false and malicious prosecu-"tions, out of Court, to such whom he knows will be "indictors, to find any guilty &c. will be an unlawful "conspiracy." These are not judicial Acts—they are not within the protection of the principle; and the person who commits them, even though he be a Judge, is left open to an Action; because he has done that, which was not fit for him to do—which did not appertain to a judicial character, "these are extra judicial"—making the distinction between judicial and extra judicial Acts, not, as in argument here has been contended, that judicial

acts are such only, as are done in Court; but extending to those which are done out of Court, if they are necessary to the administration of justice.

Let us see then, whether the Act disclosed in this case by the Defendant's plea, be such an Act, as falls within the reason and authority of this case. The act stated by the Defendant is, the issuing of a Warrant, as Chief Justice, *reciting* an information upon oath to have been sworn before him. The Warrant is full—regular on the face of it;—it recites an information to have been taken upon oath, in order to show he was acting in a judicial course of proceeding. This recitals important: though it is not sufficient to bar the Plaintiff, as matter of justification. With the view of bringing the case within the principle I have mentioned, it is not necessary to make the averment, that an information was sworn, to ground the warrant, if the act was done in a course of judicial proceeding; because it cannot be traversed. It is immaterial to decide, whether or not any error was committed by the Judge, because if he acts judicially, even though he is in error, he is protected. It is absurd to say, that the protection is confined to those cases, where no protection is required. To say, that every thing is necessary to protect a Judge from an action, that would be necessary to protect an ordinary Magistrate, is unreasonable; when the very object of the protection is, not to say, that he is justified, as having acted legally, but that he did the act in the ordinary course of justice; and for such an act is not responsible in an action at law.

Much reliance has been placed on the part of the Plaintiff, on the analogy between the act of a Judge of the King's Bench and that of an ordinary Justice of the Peace;—this argument deserves consideration. A Judge of the King's Bench has a jurisdiction over all matters of crime within the realm. They are superior Judges in criminal matters. They are so by virtue of their patents and their offices.—This power and jurisdiction is incident to their office; and it is therefore necessarily incident to their office, to have a power of issuing a warrant commensurate with this jurisdiction, to bring in the party for enquiry and trial. It

would be vain and idle to say, that the Judges of this High Court have by virtue of their offices jurisdiction over criminal matters, generally, throughout the realm; unless it was, at the same time held, that they had necessarily inherent in their office, and flowing directly from it, a power of issuing process to bring in the party charged with crime; without this their jurisdiction would be impotent,—could never be brought into action at all. All the ancient authorities speak of this power of issuing process, as necessarily incident to their office, they are Conservators of the Peace, not by prescription, as stated by some of the Gentlemen who argued this case.—They are expressly stated to be Conservators of the Peace *virtute officii*. The distinction is recognized by *Blackstone*, in his 1 *Com.* 368, between Conservators of the Peace *virtute officii*, and Conservators by prescription. The Judges of the King's Bench are stated to be Conservators of the Peace *virtute officii*. The Master of the Rolls and others are Conservators by prescription; that is, the Judges of the King's Bench have this power, as incident to their jurisdiction, and from their patents, which constitute them Supreme Judges in criminal matters, throughout the realm. It would be strange to say, that a process, which is necessary to give animation to their jurisdiction, —to give it operation and effect, to enable it to act at all, and flowing from their very office,—I mean the issuing a warrant to arrest for crime, should not, in itself, be a judicial act. There is, as I conceive, a wide distinction in this respect between a Judge of the Court of King's Bench, and an ordinary Justice of the Peace.—Justices of the Peace are not, individually, invested with a power to hear and determine any felony, or other offence. Their authority is to try before themselves and *others*. No individual Justice of the Peace has that power; but, as an individual he has merely a ministerial power, to bring the party accused before others as well as himself, for the purpose of trial. This distinction has been noticed by Sergeant *Hawkins*, and by my Brother *Fletcher*. The distinction is this; where process is issued, to bring the party accused before the person issuing the warrant and *others*, for trial, it is a ministerial act—it is ministerial to the other Justices, who are necessarily to sit

with the Justice issuing the warrant. But in the case of a Judge of the King's Bench, he has power and authority to sit alone, and try the fact, respecting which the process issued. A single Judge is invested with full power to try the criminal matter, in the same manner, as if assisted by all the Judges in full Court. He is not ministerial to others; but has this power, as incident to his office. But this distinction is further strengthened, when we come to consider the power of Justices of the Peace, as regulated by different statutes. Justices of the Peace were originally Conservators of the Peace merely, under the 34th Edw. the 1st. Justices of the Peace were first appointed by commission from the Crown, by which the Justice so commissioned, and others, of whom particular persons named were to be always present, were authorised to try felons.—See how that power has been abridged by subsequent statutes. The statute of Philip and Mary in *England*, of which the statute of the 10th Charles the 1st in Ireland is a transcript, obliges Justices of the Peace to take examinations of all persons brought before them under charge of felony, and other offences therein specified; they are to certify the examinations, and to take bail for the appearance of the party, at the next Assizes or Gaol Delivery; thereby depriving the Justices of all jurisdiction whatsoever, which had been given by their commission, in cases of felony; or at least suspending the exercise of that jurisdiction; for the statute is mandatory upon them, to transmit to the Judges of Assize, the informations, examinations and recognizances taken before them; and a power is given to the Judges of Oyer and Terminer and Gaol Delivery, if a Justice of the Peace does not comply with the statute, to fine him, in their discretion, for such default. Here, by this statute, the Justices of the Peace, in the cases therein mentioned, are clearly ministerial—Their duty is confined solely to the office of taking informations, examining the prisoner, and returning those informations and examinations to another jurisdiction for trial of the parties, under the coercion of being fined, in case of neglect. It would be strange to say, that in these respects, the Justice of the Peace was acting judicially—he is not only ministerial in all these particulars, but he is ministerial to the Judges of Assize and Gaol

Delivery, under the responsibility of being fined, in case he does not comply. Where then is the analogy between the process of arrest, issued by a Justice of Peace, and a Judge of the King's Bench? The Justice of the Peace is by law limited in his jurisdiction, having no jurisdiction singly and alone over the matter, for which his warrant might issue. No trial had by him alone, could be sustained in law;—he must have the co-operation of others, specially named for the purpose. It was not an authority flowing out of his office, but appears to have been at all times, as well before the statutes were passed for regulating the office of Justice of Peace as since, purely ministerial. This analogy, therefore, which has been relied upon as complete and decisive, with regard to the jurisdiction of a Judge of the King's Bench, appears to me not to apply. A Justice of the Peace has no authority to try, by himself, any criminal offence;—a Judge of the King's Bench has, by virtue of his office, a power to try all criminal offences, arising within the realm. He is not restrained, as to the number of persons, who are to sit in judgment upon the offender;—the trial may be by a single Judge; and the power of issuing a process to arrest is commensurate with his jurisdiction;—it arises from his very office; and is not ministerial to any other person whatsoever. The analogy thus completely fails in all its parts.

But it is said, and it deserves notice, that this act does not appear to have been done in a judicial course; because it wants the necessary concomitant of an information upon oath, to ground the warrant upon. I have already endeavoured to shew, that this is, in fact, confounding matters altogether distinct. It is saying, that the principle of protection should extend only to cases, where it is not necessary—where the jurisdiction is acknowledged, and indemnity complete, without the aid of that principle. It is against the authority of all the cases and the principle itself, which is to protect Judges, where they have erred; and yet, to shew that it comes within such a principle, it is contended you must shew, that no error at all exists. The case in 2 *Mod.* which was stated by my Brother *Mayne* very much at large, and with great precision and clearness, was bottomed upon this, that the Judge acted erroneously. The point, as to the illegality

of it, was decided by all the Judges—*Bushell's* case was originally before the Common Pleas, and afterwards before all the Judges—They all concurred in opinion, that the act done by the Judge was an illegal act; yet they all agreed, as the act was done in a course of justice, the Judge was not answerable for it, in an action at the suit of the party.

Whatever doubts or difficulties may have occurred to my mind in the progress of the argument, I have none now.—I am clearly and decidedly of opinion, that the demurrer in this case ought to be overruled;—that the matter disclosed by the Defendant in the second plea, is sufficient to show, that the act done by him, was done in a course of justice;—that it was a judicial act, flowing from his commission. The law on the matter now referred to us has received the sanction of many successive Judges, venerable from their experience, their knowledge, and integrity;—their decisions have not been questioned. There is not to be found an adjudged case nor a *dictum* varying therefrom;—neither can any reasonable analogy be argued upon, at all trenching upon this principle. I do not think it necessary to follow my much respected and highly talented Brother *Fletcher*, through that very able argument which he has delivered with such eloquence and ability. It does not appear to me, that the arguments adduced by him apply to the proposition, which has been contended for on the second point; though they apply to the first point arising on this record; namely, that the arrest was not legal. In that I concur with my Brother *Fletcher*; but I differ widely from him on the conclusion which he has drawn: that therefore, or for any other reason, this action is maintainable. Here again I must repeat, that there is not either principle, authority, reason, or analogy to warrant such conclusion. If we were to pronounce the Defendant liable to this action, we would decide contrary to the entire current of authorities;—we would unsettle the law;—we would expose the Judges to be harrassed in their persons,—to have their minds disturbed, and their station degraded, for acts done in discharge of their judicial duty. I feel myself therefore bound to pronounce, that in this case I am most clear, that the Demurrer here taken by the Plaintiff ought to be OVER-RULED.

LORD NORBURY.—After the long, elaborate, and able discussion which this case has undergone, during the course of the former and part of the present year, were it not for the singularity as well as the importance of it, I might content myself by merely expressing my assent to the very satisfactory judgment pronounced by my brothers *Fox* and *Mayne* for the Defendant; but I owe it as a matter of respect to the Bar, as well as in point of duty to the public, to assign my reasons for concurring in that judgment.

The whole of this case is spread on the pleadings. The declaration is trespass *vi et armis*, against the Defendant, who is therein designated and styled Chief Justice of the King's Bench, who is attached to answer the Plaintiff in the Common Pleas, for an assault and false imprisonment without any probable cause.

There is a further count, for beating and ill-treating the Plaintiff, in the usual language of complaint against unjustifiable force.

To this declaration the Defendant has pleaded, amongst other matters, as his second plea in justification, that which is the subject of the present argument.

By the plea in question, the Defendant sets forth, "that he is Chief Justice of the King's Bench; sets out "the King's Patent, by which he holds his office under "the Royal Authority; and that as such Chief Justice, "he issued his warrant to certain persons therein named, "under his hand and seal, reciting, that it appeared to "him, by information on oath, that on the 9th July last, "a number of persons assembled in *Fishamble-street*, "*Dublin*, and resolved to form a Committee, to repre- "present the *Roman Catholics of Ireland*, for the purpose "or under pretence of preparing a petition to parliament; "and that Plaintiff amongst others met and acted in the "appointment of such representatives, against the Sta- "tute; and that Defendant issued his warrant to appre- "hend the Plaintiff, and bring him before him or some

"f other Judge of the King's-Bench, to be dealt with "according to law. In obedience to such warrant, the "constable did arrest and apprehend the Plaintiff, and "brought him in custody; and the Defendant did forthwith "deliver the Plaintiff to bail for his appearance in "the King's-Bench, on the first sitting day of the then "next term.

To this plea the Plaintiff demurs, as insufficient in law by way of justification, on the following grounds.

1st, That the plea avers no positive offence. 2dly, That there is no averment of an information on oath, to ground the warrant. 3dly, That no offence having been charged, Plaintiff could not have been legally arrested, before indictment found. 4thly, That the act of the Defendant cannot be considered as a judicial act, but merely as ministerial or extra-judicial; and that for such ministerial or extra-judicial act the Chief Justice is liable to an action, and responsible in damages to the party complaining.

It must be allowed, that if the act in question as complained of, can be legally considered as imputable to the Defendant, in a capacity and character distinct from his judicial functions and privileges with which his office is clothed, the question would be conclusively against the plea. But it stands admitted by the demurrer, that the Defendant acted in the matter as a Judge; and it has been given up in argument, that in order to support the Plaintiff's positions, the act must appear to be merely ministerial, as contra-distinguished from judicial; as it is conceded, that for an act purely judicial, the action cannot be maintained against a Judge. In the progress of this discussion, no definition has been given or legal boundary established, by which the act in question is proved to be excluded, or put out of the sphere of that class of official duties, properly called judicial, as distinguished from ministerial. If it be once established, that the act in question emanated from, and was appropriate to the legal duties of the office of Chief Justice, it must

on this argument stand as an act purely judicial, and as such it must be exempted by the law from responsibility to the party by action. Much argument has been expended in attempting to confine judicial acts to such only as are done in open Court. But it has been demonstrated, that whether such acts as that in question be done by the Judge in chamber or *sedente curiâ*, the privileges connected with the duties of the Judge's situation, and which are given for the public safety and advantage, in which the security and independence of the Judge are interwoven, must necessarily await upon such acts, as if they are judicial. The position which I lay down, is supported by obvious principles, and the established authority of *Floyd* a *Barker*, 12 Co. 24, which has been uniformly recognized. Upon the face of the pleadings it appears, that the act of the Defendant which is complained of, is the judicially issuing a legal process, to compel an appearance in a matter within the jurisdiction of the Judge, and relating to the Court of which he is the Chief Justice.

It further appears by the plea, and it stands an admitted fact, that the Plaintiff who complains here, has been apprehended by the warrant of the Defendant; and has been held to bail, to appear in the *King's Bench*, where the cause of the committal and the investigation of the offence thereby imputed, are vested and attached, and are put in the usual course of legal investigation, as matter which is incident and peculiarly belonging to that Court. The warrant set out is good on the face of it, and is the regular process to bring the party into that Court, in cases of similar misdemeanors. The issuing of that process is directly analogous to those orders for writs from this, and the other Law Courts, called *fiats*, which are daily and hourly issued in chamber, by every Judge in the hall, in every civil action, in conformity to the law of *England* and *Ireland* for centuries. But in matters which relate to breaches of the peace—which belong to the jurisdiction of the *King's-Bench*; and its respective Judges, all their acts in such matters, and in relation to that Court, are considered as judicial acts; that is, they are the acts of a Judge, within the sphere of his judicial duty, which is all that is necessary for the present argument.

Here then is the head and front of that offending, which the Plaintiff complains of; and on which much elaborate argument has been expended, to shew that *Magna Charta* has been violated, and that the *Palladium* of *British* liberty has been outrageously assailed. But it is in fact a complaint moving from a man, who, on the case now before you, plunges out of the tribunal where he stands as a criminal to be tried, and drags the Judge, who rendered him amenable there, into this Court, that has no cognizance of a case to which we must for ever be strangers, so far as relates to the criminal offence, which the *King's Bench* only is competent to try. The common and Statute law of these realms have wisely secure the independence of the judicial order in the exercise of their functions, against the vexatious suits and attacks of irritated parties, as well as against the overbearing authority of the Crown; otherwise the Judges, from the ordinary infirmities of man, might become timid administrators of justice, and inadequate guardians of the peace, the rights, and liberties of the subject.

In the particular case, where the statute has given an action to the parties aggrieved against the Judge who refuses the Writ of *Habeas Corpus* in vacation, 2d. *Hawk.* 147; 1 *Burr.* 856, *and* 3 *Burr.* 1437. In commenting on that subject, the language of the Laws is, "*that in all other cases, they are at liberty to exercise their usual discretion, without being liable to the action of the party; and this say the books, is most agreeable to the general reason of the law, which regularly will not suffer a Judge to be liable, for what he does as Judge, in an Action by the Party.*" 'Tis apposite to the present case to observe, that the passages alluded to, as relating to acts in vacation, can only be applicable to the acts of a Judge done in Chamber. Such acts of a Judge of the King's Bench in the Chamber, if they belong to his office and relate to his Court, are constantly recognized and adopted as the acts of the Court at large, although no cause should be then depending. So in the *King and White; Lord Hardwicke's* cases, 37. The Court attached the Party for disobedience to the Chief Justice's Warrant, as a contempt of the Court to

which the Judge belonged, when he was acting within the sphere of his office and the jurisdiction of the Court.

Upon this principle, in the cases of the *King* v. *Wilkes*, and the *King* and *Almon* much has been published. In the valuable book published by the title of "A Compilation of the Opinions and Judgments of Lord Chief Justice *Wilmot*", *pa.* 97, that great and venerable man appears to have given his opinion in 1759 upon the *Habeas Corpus* bill then depending, pursuant to the order of the Lords. In that opinion, so solemnly delivered to them, and now published in that well authenticated volume, the acts done by Judges in their chambers, as well as the acts done in Court, "*are said to form that system of practice, by which the be-*"*neft of the law is dealt out to the people.*"

In the case of a motion for an attachment against *Almon* the printer of a libel [in the same volume] against the Chief Justice, for having rectified, by an order in chamber, a clerical mistake in the record of an information against Mr. *Wilkes*, it had been argued there, as here, that the act of the Judge, as being in Chamber, was not a judicial act, and of course, that the libeller could not be punished as for a contempt, summarily. The libel was admitted to be gross on the individual; but it was contended, that the Court could not take cognizance of it, by attachment. But hear the words of Sir *Eardly Wilmot*, "This is a gross charge "upon a Judge of this Court, of his endeavouring to sub-"vert the constitutional liberty of the subject," and page 259, "the constitution has provided remedies for the in-"voluntary mistakes of Judges; and for the punishing "and removing them, for voluntary perversions of Jus-"tice. Is it possible to stab the authority of a Court "more fatally, than by charging the Court, and parti-"cularly the *Chief Justice*, with such an Act? And in *pa.* 269, he proceeds, "I can make no difference between "a Judge acting in Court, Judicially, and out of Court, "but that he has not the same plenitude of power—but "still he acts under the patent, which made him a Judge "—When he issues the Warrant as Conservator of the "peace, the Court punishes the disobedience; why?

Of such description is the Defendant, against whom the Plaintiff brings his suit, to be reprized in damages by a Jury, for having exercised his grandest duty as a Judge.—I have mentioned the privileges with which the Common Law has clothed the Judge, as emanating from the King, as the fountain of Justice and the general Conservator of the peace of the Kingdom. 27. *H. 8. C.* 2. after reciting many of the prerogatives of the Crown, touching the administration of Justice, it declares the sole power of the *King* to make *Judges*.—To that *King* in his parliament the Judges have an awful responsibility.—By the 13th of *William* III. at the era of restoring the liberties of *England*, the Judge's commissions were made "*Quam diu se bene gesserit.*" By the uniform usage of many ages our Kings have delegated their whole judicial power to the Judges of the several Courts.—In the first year of the auspicious reign of his present Majesty, Ch. 23, the statute recites the monarch's declaration from the throne, "That "the Judge's independence and uprightness are essential "to the administration of Justice," and it continues their commissions beyond the demise of the Crown, with a proviso, that they may be removed by address of both Houses of Parliament.—By the 21, & 22. of his Majesty, these great privileges are confirmed to the Judges of *Ireland*.—The power of removing them for misconduct is recognized; and the right to impeach them before the King in Parliament, according to ancient Law and usage, is matter of right to those, who may suffer from their corruptions or oppressions.—and as Judge *Bathe* says, in *Mirror of Justices*, "For error of judgment or mistake a Judge "is not answerable to the King or the party; for that this "would expose the Justice of the nation, and no man "would undertake the office, at peril of action or indictment, for his judicial acts." And such is the language of *Bushell's ca. Vaug.* 154.—"If Judges have given "corrupt judgments, they have in all ages been complained of to the King, in the star chamber or Parliament;" and so says *Andrew Horne*, in his *Mirror of Justice*; and so in the case of Ship-money.

As to the objection, that there is no averment in this plea, of an information on oath to ground the Warrant

Were the Plaintiff brought up on *Habeas Corpus* to be enlarged without bail; upon a return of the Warrant and Commitment, this Court would remand him. The Warrant is good on the face of it.

In *Wilkes's*, ca. 2 *Wil.* 150, on a similar motion, and objections, Lord Chief Justice *Pratt* said, that " the " setting out the evidence was not essential to the validity " of the warrant;" and he takes the distinction as to *Rudyard's* case, 2 *Vent.* which was a commitment in execution on a conviction of an inferior court, which conviction must set out the evidence, that the superior court may judge of it; but that *Coke*, *Hale*, and *Hawkins* had not considered that essential, in a warrant to arrest; and he goes on: " I rely on the silence of the case of the seven " Bishops, when the similar warrant was not objected to " by Defendant's counsel, the greatest lawyers of that " day, and all lovers of liberty." But the argument as put here, would be to disarm the Conservator of his most salutary powers. If all the formalities contended for, are to be observed by the Chief Justice and his brethren, what will become of the public safety, in the variety of instances mentioned in *Hale*, *P. C.* and 2 Rolle, ab 134, where the Judge may order his Tipstaff to arrest, *ore tenus*, and without warrant? If there was not such a power justifiable and ready in acting, on the pressing occasions of imminent danger, the sudden bursts of outrage would scoff at the impotence of the first Magistrate in the law.

Suppose the not uncommon case of hasty and wrong-headed young men, hurrying with mortal weapons to combat with each other, shall the Chief Justice, though apprized of what has become obvious and notorious, and almost in his view, demand an information on oath, as an indispensible preliminary, before he interposes his authority? And shall his authority wait, until he shall be told, that the miserable survivor was distracted at the perpetration of a crime, which no power was competent to prevent? Suppose the fury of a maddening mob, headed by an infuriate Lord *George Gordon*, as in 1780, is the first magistrate to remain in passive inactivity, until the prisons shall be in flames, and until the conflagration

spread to the house of the Chief Justice himself, and had left nothing but the red-hot walls for the affrighted citizens to look at. Perhaps some incendiary of the law may be found—such as told and advised Lord *George Gordon*, to say " go on with good speed in your popular pursuit"—'tis now vacation—even the Chief Justice cannot send his warrant to arrest one of your friends, until he has got an information on oath against him; and if he does, I will undertake to prove, that he cannot justify, in an action, to be brought in the Common Pleas.—He might perhaps proceed to urge, that the Chief Justice, who may be a great man in his court, which sits only a few hours in each day of term, and for a few days in the year, is now in his chamber—his great authority and his robes are laid by; and you may now consider him as impotent, as with a fool's cap, and a straight waistcoat." This demagogue might urge—" 'Tis of the utmost con-" sequence *to the cause*, to shew him, that although he is rendered by the law of the land, independent of the Crown, we hold a more terrific sovereignty, to keep him in awe; and to render him unnerved and impotent; and to worry him by litigation and insult."

Where *then* should we look for the guardians of the public peace. The independence of the Judge would be " *the baseless fabric of a vision.*" But thank God we can repudiate this dangerous and unfounded doctrine; otherwise the people would be drawn, to look for military interventions, to shield them against the anarchy and tyranny of revolutionary ruffians.

I come now to a part of the Plaintiff's argument, which would endeavour to obviate the glaring consequence of clashing jurisdictions. Upon this plea, thus demurred to, it appears, that in consequence of the Warrant and arrest, the party Plaintiff and the cause in which he is held to bail are, in contemplation of law, *sub judice*, in a cause in the King's-Bench. The present action is sought to be converted into a species of *Certiorari*, to remove that original cause into this Court. In the case of *Burdett* v. *Abbot*, as fully reported in 14 *East.* 64, *Holroyd* for the Plaintiff, in arguing the Demurrer to the Defendant's

plea, which set forth the order of the Commons, and relied on it, *Holroyd* for the Plaintiff there admitted, that, if the matter had come before the Court on a return to an *Habeas Corpus*, the Court would have remanded the Plaintiff; "*because*," said he, "*He is, as it were, in custody, in the committing Court*"—(so situate exactly, is the Plaintiff here) and *Holroyd* goes on to argue, that "if the Court were to discharge the Plaintiff, it would "be assuming a jurisdiction over proceedings of another "Court." But he proceeds to argue, "that the party "may have his action, if aggrieved;" disputing the privilege to commit. Lord *Ellenborough* immediately observed, "then you give up *Bushel's* case, which was a "similar interference." *Holroyd* then makes the distinction, that "*Bushel's* case was a committal by a Court "of *Oyer* and *Terminer*." Lord *Ellenborough* then questions the position in *Bushel's* case, "that the committal "and the cause of it ought to be made appear to the "Court, where the *Habeas Corpus* is returned, as it "appeared to the Court committing." *Holroyd* then starts another distinction, between a committal as in *Burdett's* case, being a sentence of punishment, and a committal for trial, which must take place in a reasonable time, or the prisoner be discharged; in which case *Holroyd's* argument necessarily infers, that in such a case of an arrest (as here) by way of process, to hold to bail in another jurisdiction, (and that too, the first criminal Court) it cannot be questioned. In p. 123 of the volume last cited, during Mr. *Holroyd's* very ingenious argument, Mr. Justice *Bayly* observes to him, that he had not answered the question that was put to him, viz. "whether "an action would lie in the *Common Pleas* against an officer of the *King's-Bench*, for executing its Warrant for a contempt, to question the validity of the commitment; or whether an action would lie against the Judge or Judges, who signed such Warrant?" *Holroyd* answers, "certainly no action will lie against the Judges, they are "answerable in another way, and no action will lie against "them."

Here then, the Counsel for Mr. *Taaffe* in *Ireland*, have got a full answer and refutation from Sir *Francis Burdett's*

Counsel in *Westminster Hall*. *Holroyd* there supposed a case where the Judges might issue a Warrant, in a matter of which they had no Jurisdiction ; and which appeared so on the face of the Warrant, on return to the *Habeas Corpus*.

Lord *Ellenborough* asks, " is there any case, where " when such discharge had been refused on an *Habeas* " *Corpus*, that the Court has held out the consolation, that " though they could not discharge, yet that the party had " his remedy by action ;" Lord *Ellenborough* then adverts to the cases of *Crosbie* and *Oliver*, and says, that " Ser- " jeant *Glynn* never advised an action of Trespass, after " they were remanded ; and none was ever brought, to " leave the matter of Law to the Jury."

Demonstrably, *that* is the struggle by the Plaintiff here; and that too, without adverting to the principle in *Morgan* v. *Hughes* 2 Term. Rep. 23, where it was incumbent on the party, in an action for malicious arrest, to shew the cause at an end ; but here the pleadings, as they now stand in this case, lay a foundation to presume, that the present Plaintiff may be at present a convicted Criminal in the Court of *King's Bench*, seeking from a Jury in the *Common-Pleas*, to make the Chief Justice reprize the Plaintiff the full amount of the fine, which he may have been sentenced by the *King's-Bench*, to pay to the Crown.

When *Magna Charta* is said to be infringed by the issuing of the process, or Warrant in question, we should recollect, that the Plaintiff complains of an unauthorized force of the Defendant, in issuing the judicial process spread in the plea, which is demurred to.

The arguments in *Bushel's* case have been resorted to, where much encouragement was given to bring an action against the Recorder of *London*, and others of his Court, in a case which savoured strongly of oppression—yet, when this action was brought before Lord Chief Justice *Hale* and his brethern in the *King's-Bench*, on a motion in that Court on the part of the Defendant for time to

plead, that just and constitutional Judge expresses himself, without doubt or hesitation, as follows: "That the action "would not lie; and that although the Judgment of com- "mittal had stood reversed, by the proceeding on the "*Habeas Corpus* in the *Common-Pleas*, yet, no action "could be maintained against the Judge, for such Judicial "act." That indeed, was a case of actual imprisonment; but this is a complaint of one, who disdains to be rendered amenable to that Court, where, in contemplation of Law, he is in custody.

I thank God! that no Judge can be found in these times, to indulge malignant feelings of oppression; but if such a wicked and untoward spirit should contaminate the Judgment seat or Judge's chamber, the delinquent would soon find himself made responsible in Parliament, to the *King*. If the Judges of the *King's-Bench* are to be harrassed *seriatim*, in cases like the present; and that they are not only to be libelled and calumniated for their Judicial acts, but to be hunted through the Law Courts, by a set of men, who disclaim all authority of the privileged orders of society,—if such proceedings are tolerated and legalized by the Judgments of the *Common Pleas*, it would be administering to the passions of angry agitators, —men of ordinary nerves will loose their firmness in the Judgment seat, and a revolutionary Tribunal would soon be substituted in the room of our judicial order:—If their characters, their privileges, and their robes are torn from their shoulders and trampled in the dirt,—without the ordinary protection even by Law to the humble Magistrate, I say, the Justice of Peace would be the more enviable man. From the 21st *James* I. to the 43d *George* III. a great code of statutes exist in *England* and *Ireland*, defining the powers of Justices of peace, and officers of the Law and Revenue—The same Laws afford them great advantages, of defence, of notice, and of pleading the general issue, without the embarrasments of pleading special justifications; and the Law remunerated them with double costs, if sued without foundation—But where are the similar protections, in the statute books, for the Judges of the land—There are none such; and the necessary inferrence is, that the immemorial sense of the Legislature is, that

that privileged order is protected, by peculiar, inherent, and unquestioned privileges; otherwise, they never could have remained unprotected against vexatious litigation, upon every frivolous occasion. Some difficulty arose in the case of general Warrants reported 11 *State Trials* 320; and *Key* v. *Earbury*, 1 *Ha. Pl.* c. 562 as to the privileges, to which a secretary of state was entitled, in issuing his Warrant for minor offences—It is not for me to animadvert upon the Judgment of the great man, who pronounced a Judgment in that case, with popular applause; but I find Lord *Kenyon*, in *Despard's* case of modern authority, questioning that decision.

But was it ever doubted, in that or any other case, until the present, that the privileges of the office of the Lord Chief Justice attend upon him, as incident to his office, in every department of his official duty, and in every part of the realm, within which he is Chief Justice? The power of a Judge, sitting in Court during the terms, does not amount to one fourth part of each revolving year. Is it for that short period only, that the Chief Justices are to be considered, as Judicial; and on all other occasions, as merely ministerial, and liable to action?—There is no question, that the Justice of peace, in his ministerial capacity, is liable; but could the *King's Bench* entertain complaint or information against one of it's own Judges, in his own Court, for having issued the process of their Court?—The *King's-Bench* could not, would not, ought not. But 'tis argued, that the *Common Pleas* would, could, and ought; and in the Language of the Law, that great Law officer, the Chief Justice is now *attached* to answer, and awaiting our decision, whether we shall retain him as a Defendant, to answer for the exercise of his judicial discretion, in matters within his special Jurisdiction, and of high importance to the publick peace, and most properly submitted to his judicial wisdom.

The transaction in question arises out of an Act of Parliament, creating offences spread on the face of the warraut, as setforth in the plea, which act was made to guard against a prevalent mischief, that the history of our own times had evinced to be productive of danger to the state.

It was a matter of no inconsiderable moment, to have the highest judicial sanction to the process and warrant, framed upon a modern Statute, and giving operation to the law. The offence described in the warrant, is founded on the convention Act of 1793. We all know the history of that law, the preamble of which was soon followed by the legislature of *England* in her enactments, to meet the prevalent mischiefs of the self-elected societies, and the tumultuous assemblies who filled the audiences of such enlightened revolutionists as orator *Thelwal*. When Lord *Grenville*, in the House of Lords, enforced the necessity of those laws, he wisely observed, " that those clubs and " societies, in imitation of the similar societies in " *France*, were founded on, what was called, the rights of " man; they were rights however, (as they explained " them,) such as were incompatible with law, religion, " order, and morality." These societies had eloquent partizans; petitions crowded the table of the House of Commons; and *Magna Charta* and the Bill of Rights were sounded forth with popular confidence. " *Lex denique lata.*" This law of the *Irish* legislature was, in principle, adopted in *England*; and the political fame of Sir *William Grant*, in the course of the debates on that subject, raised him to conspicuous eminence by his luminous argument, which settled the vibrating opinion. The laws in each Country *in pari materiâ*, were the same in principle.

The licentious spirit in *England* was put down by the vigour of the law, and the returning good sense of the people. When it was of late unfortunately become imperitively necessary to bring that convention Act into operation here, I cannot subscribe to the confident assertion of its having been unbecoming the high office of the Chief Justice, to grant a warrant which might have been issued by a common Magistrate. As this argument has been obtruded upon the case, I think it right to say, that in my opinion, it was a well advised measure to resort to the highest judicial authority, who was competent to give his sanction to the warrant, which delineates and defines the offence, with legal and technical accuracy. The present action is a bold effort to render the law inoperative in *Ireland*. If the Defendant had been an inferior Magistrate,

slanderous publications and liability to action, might create terror in the humble mind of an ordinary Justice of the Peace, to deter him from issuing his warrant, in the first instance of acting upon the statue: but the law officers of the Crown would have been culpable in the extreme, where the peace of the Country was at stake, if they had not taken the most effectual means to prevent the inchoate mischief, with the aid of the first criminal Judge,—to make the party amenable to the highest criminal tribunal, to be dealt with according to law. If matters had not been so conducted, the law might have been condemned as a dead letter, and become rusty as old armoury in the Tower, the factions might then exult—that they had worked a virtual repeal of the law.

In the case of the *King* v. *Despard*, 7 Term Reports, when *Ferguson* moved for the prisoner's discharge, who was committed for treasonable practices, as the warrant had not deliniated his offence with certainty; and it was argued there as here, that there was no adjudged case upon the point; but it was well answered, that if no point is to be considered as law, unless it has been judicially decided, then farewell the law of the land, and it is sufficient, if it has been considered law at all times. It has been observed also, that no such plea as the present, ever was judicially sanctioned; that is probably true, for no such action was ever brought before; and as Lord *Kenyon* observed, in the case I have last cited. "Though experiments of this "kind are frequently made, they seldom succeed. I will "not" said he "overturn the law of the land, as it has "been handed down to me. It is not for Judges, who "are to watch ever the law, to overset it. I am clearly "of opinion, that if we are to yield to this argument, we "should forget the duty we owe to the public." Before I conclude, let me compose the hitherto undisturbed ashes of Lord Chief Justice *Wilmot*, of whose character and opinions much has been mis-conceived. On the present occasion, I cannot humiliate that great man's memory, by entering into a laboured vindication of one of the purest judicial characters, that ever adorned *Westminster Hall*. There *Wilmot* has ever been considered "*Clarum et venerabile nomen*;" his opinions and Judgments are *there*, as I

hope they will be *here*, of high authority; and are treated with respect, whenever they are cited; as in the late case of *Burdet* a *Abbot*, when the Attorney-General resorts to his *admirable argument*, as he calls it, in *The King* v. *Almon*.

I think that the public and the profession of the law have an honourable duty, as well as interest, in handing down his reputation, unsullied to posterity. I hope, that it may not be taken amiss by those who have expressed sentiments of a different kind, that I make this endeavour, to remove their impression—It is not my intention' " *To wound the living, whilst I shield the dead*"—In the volume of his opinions, so often quoted, there is given a great legacy to learning and the law. But in the history of Sir *Eardly Wilmot's* virtuous and laborious life, he has left, what is still more valuable to our profession, and to the world,—he has left the most perfect model of a learned, upright, and constitutional Judge, which those who succeed him should be zealous to imitate.—It never was even insinuated, whilst he lived, that he was a servile adulator to, or dependant on any superior; or that he was guilty of a mean and vicious solicitude for a paltry popularity; but he was the

" *Justum et tenacem propositi virum,*"
Non civium ardor prava jubentium,
Non vultus instantis Tyranni—mente quatit solida.

I hope, for the honor of the Bench, that the people will never want such faithful guardians, to protect them against the oppressions of the mighty, or the licentious Tyranny of a mob.

There never was a period, when a man of proud virtue, and unshaken firmness, in asserting the authority of a Chief Justice of the *King's-Bench*, and those privileges of his office, of which he is a trustee, was of more value to the publick—The dignified fortitude of such a Judge, is one of the best protections of a free and brave people; and will be his best support in the performance of his arduous duties, amidst the various attacks of slanderous

assailants, and the agitated ferment of infuriated factions.

Si fractus illabitur orbis,
Impavidum ferient ruinæ.

FINIS.